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# **C A S E S**

**DECIDED IN**

## **THE COURT OF SESSION,**

**FROM**

**MAY 12. 1825 TO JULY 11. 1826.**

**REPORTED BY**

**PATRICK SHAW AND ALEX. DUNLOP JUN.  
ESQUIRES, ADVOCATES.**

**VOL. IV.**

**EDINBURGH:**

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**1826.**



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# **JUDGES**

**OF THE**

## **COURT OF SESSION**

**DURING THE PERIOD OF THESE REPORTS.**



### **FIRST DIVISION.**

**Lord President Hope.**

**Lord HERMAND.**

**Lord CRAIGIE.**

**Lord BALGRAY.**

**Lord GILLIES.**

#### **PERMANENT LORDS ORDINARY.**

**Lord MEADOWBANK.**

**Lord ELDIN.**

### **SECOND DIVISION.**

**Lord Justice-Clerk BOYLE.**

**Lord GLENLEE.**

**Lord ROBERTSON.**

**Lord PITMILLY.**

**Lord ALLOWAY.**

**PERMANENT LORDS ORDINARY.**

**LORD CRINGLETIE.**

**LORD MACKENZIE.**

**LORD ORDINARY ON THE BILLS.**

**LORD MEDWYN.**

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**GEORGE CRANSTOUN, Esquire, Dean of Faculty.**

**SIR WILLIAM RAE, Baronet, Lord Advocate.**

**JOHN HOPE, Esquire, Solicitor-General.**

## THE CASES

DECIDED IN

THE COURT OF SESSION,

SUMMER 1825.

JOHN GLASS, Advocate.—*Jameson*—*T. H. Miller*.

WILLIAM M'INTOSH, Respondent.—*More*.

No. 1.

*Discharge—Composition Contract.*—1. A discharge of a debt, apparently unqualified, found not to bar a claim for a composition to which it had reference.—2. Whether a discharge under a composition contract requires to be tested.

M'INTOSH brought an action before the Sheriff of Lanarkshire, alleging that he had been employed by Glass as manager of his dye-works,—that a balance of wages was due to him,—that he had agreed to accept of a composition, for which bills were to be granted within a particular period,—but that Glass had failed to do so, and therefore concluding against him for the full sum. In evidence of the debt, M'Intosh founded upon an entry of it in a list of debts which had been made up by Glass at the time that the composition was agreed to. To this it was answered, 1. That no debt was due, and that the entry was qualified by the word 'disputed' being annexed to it, and that in truth M'Intosh was owing a large sum of damages; and, 2. That, at all events, the claim had been discharged. In support of this latter defence, Glass founded upon a deed, which was in these terms: 'We, the subscribers named and designed in the subscription clause of these presents, creditors, or agents having power from, and taking burden on us for creditors of John Glass, dyer at Finnieston, near Glasgow,—considering that the affairs of the said John Glass having become embarrassed, he called a meeting of his creditors, which was held at Glasgow on the 28d day of September 1819; at which meeting the said John Glass proposed

May 12. 1825.

1st DIVISION.  
Lord Meadowbank.  
D.

' to pay them a composition of 9s. 4d. in the pound on the  
 ' amount of the debts owing by him, provided they would grant  
 ' him a discharge: That the said meeting was, by the creditors  
 ' present, adjourned till the 30th day of September then next;  
 ' at which meeting the said John Glass repeated the said offer of  
 ' composition of 9s. 4d. per pound, payable at 6, 9, 12, and 15  
 ' months from the 16th day of October 1819, with security for  
 ' the last instalment; and an agreement having been drawn out,  
 ' the said offer was duly signed by us:—And now, seeing that  
 ' the said offer of composition has been accepted of by the whole  
 ' creditors of the said John Glass, and that he has delivered to  
 ' us bills for the foresaid composition, payable in the propor-  
 ' tions and at the periods foresaid, with security to our satisfac-  
 ' tion for the last instalment, therefore we have exonerated and  
 ' discharged, as we do by these presents exoner and acquit, and  
 ' for ever simpliciter discharge the said John Glass, his heirs,  
 ' executors, and successors, of all debts and sums of money due  
 ' by him to us, or to the constituents of such of us as herein act  
 ' as agents, prior to the 15th day of September last, in whatever  
 ' manner of way the said debts or sums of money may be vouched  
 ' or constituted; and such of us as have not at present in our  
 ' possession the bills or vouchers of debt against the said John  
 ' Glass, oblige ourselves, and our respective constituents, to retire  
 ' or procure and deliver up the same to him without delay; re-  
 ' serving to such of us as hold collateral securities for the debts  
 ' owing by the said John Glass, our claims against such collateral  
 ' securities, as accords: And we oblige us, and our several consti-  
 ' tuents, to warrant this discharge at all hands, and against all  
 ' mortals, as law will: And we consent to the registration hereof in  
 ' the books of Council and Session, or others competent, therein to  
 ' remain for preservation; and if needful, that letters of horning  
 ' on six days charge, and all other execution necessary, may pass  
 ' upon a decree to be interponed hereto in form, as effeirs; and  
 ' thereto constitute  
 ' our procurators. In witness whereof, these presents, written on  
 ' stamped parchment by David Watson, apprentice to James Hous-  
 ' ton Maxwell, writer in Glasgow, are subscribed, &c. This deed  
 ' was signed by M'Intosh, but the witnesses' names were not  
 ' mentioned; and he contended, 1. That as it was not tested in  
 ' terms of the statute 1681, it was not binding; 2. That it was condi-  
 ' tional, having been granted on the assumption that the composition  
 ' bills would be granted, which confessedly had not been done,  
 ' because Glass did not put his defence upon that, but on the cir-



cumstance of no debt being due; and, 3. That the obligation to take the composition bills was no longer binding, as the stipulated period had expired. The Sheriff, after appointing Glass to condescend on the damages claimed by him, which he failed to do, decerned against him, 'in respect the terms on which the discharge was granted were not implemented by the defender, by granting the bills for the composition, and therefore that said discharge is not obligatory on the pursuer.' Glass having brought an advocacy, the Lord Ordinary found, 'That the subscription of the respondent in the advocacy to the discharge founded on by the advocator, being admitted, the said discharge must, according to the universal practice and understanding of the country, be received as valid and obligatory, notwithstanding the same is not tested according to the provisions of the statute 1681, cap. 5: That, by the said deed, the respondent and the other creditors did, in terms the most unlimited, and without reservation or restriction whatsoever, exoner and acquit, and for ever simpliciter discharge the said John Glass and his heirs &c. of all debts and sums of money due by him to the said respondent and the other creditors, in whatsoever way the said debts or sums of money might be constituted, prior to the 15th day of September 1819; as also to surrender and deliver up all the vouchers of the debts then due to the said respondent and the other creditors:—that the presumption thereby afforded against the respondent cannot be redargued by parole proof, or otherwise than by the writ or oath of the advocator:—that no such proof has been offered; and that the admissions hitherto made by the advocator must be taken along with the qualifications thereto annexed, which are altogether exclusive of the respondent's claim: Therefore advocates the cause, assoilzies the advocator, and decerns.' M'Intosh having reclaimed, the Court altered, and found 'that the petitioner's claim is not barred by the discharge founded on by the respondent (Glass,) and remit to the Lord Ordinary to hear parties as to the rate of wages, and also as to the claim of damages, and to proceed in the cause as to his Lordship shall seem proper;' found expenses due, and thereafter refused a petition by Glass, without answers.

None of the Judges expressed any doubt as to the discharge being sufficiently binding in point of form; but they held, that as there was evidence that a debt was due, and it was admitted that no composition bills had been granted by Glass to M'Intosh, the discharge could not prevent him from suing for the composition, to which he latterly restricted his demand. As, however, the amount

of the wages was disputed, and the claim of damages was insisted on, they remitted these points to be considered by the Lord Ordinary.

*Advocator's Authority.*—Harris, March 2. 1822, (ante, Vol. I. No. 420.)

*Respondent's Authorities.*—2, Ersk. 3. 32; 2, Bell, 362. 598.

GIBSON and OLIPHANT, W. S.—C. GORDON,—Agents.

No. 2.

P. ARNOT, Advocate.—*Forsyth—Jeffrey.*

T. WATT, Respondent.—*More.*

*Sale—Acquiescence.*—An allegation that malt had been sold for ready money, found barred by the seller having received a bill, and made no objections to it for nearly three weeks thereafter.

May 12. 1825.

2d DIVISION.

Bill-Chamber.

Lord Eldin.

B.

WATT sold a quantity of malt at 27s. per boll to Arnot, who, on the 14th of June, sent his bill at four months for the amount. After writing a letter on the 27th, demanding payment, Watt, on the 2d of July, raised an action before the Magistrates of Glasgow against Arnot, alleging that the purchase was a ready money bargain, and that he had returned the bill to Arnot immediately after receiving it, and concluding for instant payment. This allegation having been denied, Watt referred it to the oath of Arnot, who deponed, that although he had the bill in his hands at a meeting on the 16th of June, yet he had returned it to Watt, and never received it back. Arnot then pleaded in defence, 1. That as Watt had retained the bill so long without objection, he must be held to have acquiesced in that way of settling the transaction; and, 2. That, by the custom of Glasgow, a credit of four months was always allowed on sales of malt. The Magistrates allowed a proof of the custom; on advising which, they decerned in terms of the libel; but a bill of advocation having been presented by Arnot, the Lord Ordinary remitted to them with instructions to recall their interlocutor, and to assoilzie Arnot.—The Court unanimously adhered.

Their Lordships were of opinion, that whatever might have been the result, had Watt immediately refused the bill, and raised an action for the price, he was barred by acquiescence, in consequence of having retained it so long; and that the proof as to the usage was unnecessary.

W. ALEXANDER, W. S.—W. and A. G. ELLIS, W. S.—Agents.

Mrs. REID, Advocator.—*W. Bell.*

No. 3.

Mrs. SCOTT, Respondent.—*J. Miller.*

*Slander.*—Expressions of a defamatory nature, used hastily in the heat of passion, held not actionable.

Mrs. REID brought an action of damages for defamation, before the Commissaries, against Mrs. Scott. From the proof it appeared, that on one occasion, when Mrs. Scott was greatly irritated at her servant, in consequence of her having been late at night in Mrs. Reid's house, contrary to repeated orders, she desired the servant 'to go back to that whore's house;' and stated that Mrs. Reid was 'nothing else than a whore.' The Commissaries having assoilzied Mrs. Scott, and found her entitled to expenses, Mrs. Reid presented a bill of advocation. The Lord Ordinary remitted to them to recall their interlocutor, and to find Mrs. Reid entitled to damages; but the Court altered, and remitted to the Commissaries to adhere to their judgment, except as to expenses, and to find them due to neither party.

May 12. 1825.

2d Division.

Bill-Chamber.

Lord Eldon.

B.

The majority of the Court were of opinion, that even if full credit were to be given to Mrs. Reid's witnesses, (which they doubted,) the circumstances deponed to did not amount to defamation, as there was no repetition, or attempt to spread the scandal, but merely hasty expressions used in the course of a scolding match, and in the heat of passion, which would have formed a more proper subject of proceedings in the Police Court, than of an action of damages.

Lord Justice Clerk thought that the words used were actionable, and that damages to some extent, however small, were due.

J. MALCOLM,—D. GRAY,—Agents.

inction was drawn between any of the houses in the different parts of the street.

HOTCHKIS and MEIKLEJOHN, W. 8.—D. GREIG, W. 8.—COUPER and HUNT, W. 8. Agents.

No. 6.

D. SELLERS, Advocate.—*Neaves*.  
HELEN LINDSAY, Respondent.—*Currie*.

*Advocation—Res Judicata.*—1.—Whether an advocation without leave be competent, on the ground of the incompetency of an action in respect of an alleged *res judicata*? and,—2.—Whether absolvitor from an action of damages before the Baillies, for breach of promise of marriage, forms a *res judicata*, so as to bar an action of damages for seduction before the Commissaries?

May 18. 1825.

2D DIVISION.

Bill-Chamber.

Lord Cringletie.

B.

HELEN LINDSAY raised an action against David Sellers before the Magistrates of Dundee, narrating, that he ‘ had come under ‘ an obligation to marry her ;—that, in consequence of the intimation and attachment between the parties, and also in consequence of the promise and obligation come under by the defender ‘ to make her his lawful wife, she was induced to submit to his ‘ embraces ;’ and concluding for ‘ damages for breach of promise ‘ of marriage as aforesaid, and as a solatium to the pursuer.’ The Magistrates, on advising a proof, pronounced a decree of absolvitor, in which Lindsay acquiesced ; but she instituted a new action in the Commissary Court, concluding for a declarator of marriage ; or alternatively, ‘ if it shall be found that the complainer is not ‘ married to the said David Sellers,’ for damages, ‘ upon account ‘ of his seducing the complainer, and thereby inducing her to ‘ yield to his embraces.’ Sellers, on a reference to his oath as to the alleged promise of marriage, deponed negative, and pleaded *res judicata* quoad the conclusion for damages. The Commissaries assoilzied him from the conclusions of declarator, but allowed Lindsay ‘ a proof of the facts stated in her condescendence, in so ‘ far as the same go to support the conclusions in her libel for ‘ damages for seduction.’ Sellers, without obtaining the permission of the Commissaries, presented a bill of advocation, on the ground that the action was incompetent, in consequence of the final judgment of the Magistrates of Dundee, which formed a *res judicata*. To this it was answered, 1. That the narrative of the action before the Magistrates alleged a marriage between the parties, which was totally incompetent before them, and their decision could therefore form no *res judicata* ;—that the conclusion for



## No. 7.

JOHN M'ILWRATH, Suspender.—*Napier*.  
DONALD M'DONALD, Charger.—*Jameson*.

May 14. 1825.

1st DIVISION.  
Bill-Chamber.  
Lords Hermand  
and Craigie.

D.

THIS was a question as to passing a bill of suspension, without caution, of a charge upon a decree by the Court of Admiralty. The Lord Ordinary and the Court refused it, in respect of no caution being offered.

D. STEWART,—CAMPBELL and MACDOWALL,—Agents.

## No. 8.

HENRY MICHAEL, Suspender.—*A. McNeill*.  
J. WILSON, Charger.—*Shaw*.

*Expenses*.—Circumstances under which a charge on a decree for expenses, in name of the agent, found not affected by the principal decree being for a random sum of damages.

May 14. 1825.

1st DIVISION.  
Lord Meadow-  
bank.

S.

BOYD raised an action of damages against Michael before the Magistrates of Glasgow, in which, after a litigation, (but after Michael had ceased to make appearance,) he obtained decree in terms of the libel. His agent, Wilson, got decree for the expenses in his own name, and gave Michael a charge of payment. Of this a suspension was brought by Michael, but he did not call Boyd as a party. The Lord Ordinary found the letters orderly proceeded at the instance of Wilson: 'But, in respect of the 'circumstances of this case, finds that the suspender was entitled 'to present a bill of suspension of the decree pronounced by the 'Magistrates against him for a random sum of damages, for 'which a charge was afterwards given; and therefore finds the 'charger, Wilson, not entitled to the expenses which have been 'incurred by him in this Court.'—The Court, however, being satisfied that this ratio could not affect Wilson's claim, unanimously altered, and found expenses due.

C. FISHER,—A. P. HENDERSON,—Agents.

J. M'CHRISTIE, Suspender.—*Sol.-Gen. Hope—Marshall.*

No. 9.

Mrs H. KEA or FISHER, Charger.—*Gillies.*

*Removing—Title to Pursue.*—1.—Whether competent for a liferentrix to pursue a removing under an irritancy, where the lease was granted by her and the fiar jointly.  
 —2.—Whether an irritancy must be declared before decreeing in a removing; and,  
 —3.—Whether competent to purge after extract.

In an action before the Sheriff of Perth, at the instance of Mrs. Fisher, liferentrix of the lands of Hillhead, praying to have M'Christie, the tenant, summarily removed under the A. S. Dec. 14. 1756, as being more than two years rent in arrear, the Sheriff decreed in the removing. A precept of warning having been obtained on this decree, (which, however, was not extracted,) M'Christie presented a bill of suspension, chiefly on the grounds, 1. That as he held his tack (which was for the term of twenty-five years) from the fiar and liferentrix jointly, the liferentrix alone was not entitled to pursue a process of removing.—2. That the summons did not oblige to have the irritancy declared, but merely to have him removed, and that the Sheriff had not found that the irritancy was incurred; and, 3. That the irritancy established by the A. S. was purgeable even after extract of the inferior court decree; and that in this case the decree had not been extracted.—The Lord Ordinary refused the bill; but the Court unanimously altered, and remitted to his Lordship to pass it.

May 14. 1835.

2d Division.

Bill-Chamber.

Lord Medwyn.

F.

*Suspender's Authorities.*—(1.)—Lady Kilbirnie, Dec. 22. 1620, (7182); Bruce, Nov. 10. 1808, (F. C.)—(2.)—2 Ersk. 8. 14. and 5. 25; Bell on Leases, 553.—(3.)—Campbell, Jan. 16. 1777, (7252.)

*Charger's Authorities.*—(3.)—Clerk, March 6. 1759, (7737); Hunter, Nov. 10. 1800, (App. 1. Irritancy); Kinloch, June 16. 1812, (F. C.)

LINNING and NIVEN, W. S.—W. SPALDING,—Agents.

J. SWAN, Suspender.—*H. Bruce.*

No. 10.

ELIZABETH CRAIG, Charger.—*J. W. Dickson—J. J. Boswell.*

*Process.*—A suspension, before extract, of a decree of a Sheriff for £8 : 14 : 6, held competent.

CRAIG brought an action before the Sheriff of Edinburgh, concluding against Swan for £8 : 14 : 6. After some proceedings, the Sheriff appointed Swan to be judicially examined; and he having failed to comply with this order, he was held as confessed, and decree pronounced in terms of the libel. Before this decree

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1st Division.

Lord Meadow-

bank.

D.

was extracted, Swan presented a bill of suspension as of a threatened charge, which was passed. Craig then objected, that a suspension of a decree was incompetent before extract. To this it was answered, that although suspension was incompetent before extract, where the sum exceeds £12, and where there was the remedy of advocation, yet it was not so where it was under that sum; because, otherwise, there would be no legal remedy.—The Lord Ordinary, ‘Having heard parties’ procurators upon the objection stated by the charger to the competency of the present suspension, on the ground that the Sheriff’s decree sought to be suspended has never yet been extracted, as is proved by the certificate in process—In respect that the sum in question is under £12 sterling, and that an advocation would therefore have been incompetent, sustains the suspension as the proper remedy;’—and, on the merits, remitted to the Sheriff to take the suspender’s declaration, and thereafter to proceed as he should see cause.—To this interlocutor the Court unanimously adhered.

*Suspender’s Authorities.*—(1.)—Galletly, June 15. 1824, (ante, Vol. III. No. 191); Finlay and Co. Dec. 18. 1822, (ante, Vol. II. No. 94); 4. Ersk. 3. 8; 4. Ersk. Pr. 3. 5; 4. St. 1. 34; Clark, Feb. 24. 1804, (12216.)

*Charger’s Authorities.*—(1.)—Turner, Feb. 12. (ante, Vol. III. No. 180); Alexander, July 9. 1824, (ante, Vol. III. No. 186); 1663, c. 9.

J. PEDIE, W. S.—J. SINGER, W. S.—Agents.

## No. 11.

W. CHALMERS, Advocate.—*Graham Bell.*

PETER ROXBURGH, Respondent.—*Jameson.*

*Forum Competens.*—Held competent, in an action of count and reckoning before a Sheriff, to restrict an heritable bond to a sum below its specified amount, on evidence to that effect.

May 18. 1825.

1st DIVISION.

Lord Eldon.

THE late William Roxburgh granted an heritable bond for £150 to Chalmers. Roxburgh was succeeded as heir by the respondent Peter, who afterwards sold the subjects, over which the bond extended, to Chalmers. Various cash transactions having taken place between them, Peter brought an action of count and reckoning against Chalmers before the Sheriff of Dumfries. In this process, Chalmers claimed credit, inter alia, for the bond of £150. To this it was answered, that Chalmers had only advanced £100, and this was offered to be proved by his oath. The Sheriff having appointed him to depone, he failed to do so, and was therefore held as confessed, and decree pro-



nounced on the assumption that the bond was only for £100. Chalmers then brought an advocacy, and contended, inter alia, that it was incompetent, incidentally, in an action of count and reckoning before a Sheriff, to object to an heritable bond, on which infestment had been taken, to the effect of setting it aside either entirely or partly; and that this could only be done in a process of reduction. The Lord Ordinary repelled the reasons of advocacy, and the Court refused a petition without answers.

*Advocator's Authorities.*—(2.)—2 *Erk.* 2. 17; Wagh, July 7. 1680, (5529); Forbes, Nov. 1683, (5531.)

W. STEWART, W. S.—W. M. LITTLE,—Agents.

Lieut.-Colonel GORDON, Advocate.—*Dean of F. Cranstoun—* No. 12.  
*Cunninghame—Robertson.*  
 J. ANDERSON, Respondent.—*Skene—Handyside.*

*Landlord and Tenant—Lease.*—Held that a regulation in general articles relative to all the leases on an estate, that the tenants should not at any time carry away the fodder, but should use it on their farms, did not apply to the last year of the tack.

THIS case involved the same general point which is noticed ante, Vol. III. No. 440, which see. Anderson obtained a lease, by missives, of the farm of Kirkton of Slains, from Colonel Gordon of Cluny, for 21 years from Whitsunday and Martinmas 1801. By the missives it was, inter alia, stipulated that a regular instrument of lease should be executed; that the tenant was to be governed 'by the general conditions laid down by me' (the landlord) 'for the whole estate;' and reference was made to an offer by another tenant (Wilkins,) accepted a few days previously, where it was agreed that there should be inserted in his lease 'all the regulations intended to be laid down for the estate, if by that time 'ready and digested.' Anderson entered to possession by virtue of the missives, but did not receive any straw or fodder, either from the landlord or outgoing tenant. At this time the regulations had not been prepared, nor did it appear that the precise nature of those which were intended had been communicated to Anderson. Subsequently, however, and prior to 1804, they were made and printed; and in that year a draft of a general lease, as the form by which all the leases on the estate were to be executed, was presented to each of the tenants, and subscribed, among others, by Anderson. It was there stipulated, 'that the 'tenant should be bound by the whole articles, conditions, stipula-

May 18. 1825.

1st Division.

Lord Alloway.

D.

tions, and others contained in the general articles regarding 'said estate herein before referred to, and held as part of these 'presents;' and both parties bound themselves to implement 'their respective parts of the premises, and of said separate 'articles, to each other.' Although this draft was subscribed by Anderson, no instrument of lease was executed, the missives remaining the sole title of possession; and there was no evidence that a copy of the regulations had been delivered to or seen by him. Among other conditions laid down in them, the 16th article appointed 'the whole fodder to be used upon the ground, 'and none sold or carried away at any time, hay only excepted; 'and all the dung to be laid on the farm the last year of the 'lease.' Anderson having proposed to carry away the fodder of the last year of the lease, Colonel Gordon, founding on the above regulation, applied, in August 1822, to the Sheriff of Aberdeen, for an interdict, and to ordain him to use the fodder on the farm. The Sheriff at first granted interdict, but thereafter recalled it; and Colonel Gordon thereupon advocated, contending, 1. That Anderson was effectually bound by the stipulation in the printed regulations; and, 2. That this being a special contract, the ordinary rule which permitted the tenant to carry away the fodder of the last year did not apply; and in support of this plea, he relied on the case of the Duke of Roxburghe against Robertson, decided in the House of Lords on the 17th of July 1820. To this Anderson answered, 1. That he had not subscribed the regulations,—that they were not in existence when he obtained his lease,—and that the reference to them in the missives was too vague and general to be binding on him;—and, 2. That even although they were, the stipulation merely expressed what was the general law, and did not create any special contract, and therefore it was to be interpreted according to the invariable practice of Scotland. The Lord Ordinary reported the case on informations, in respect of the case of Roxburghe, and subjoined this note: 'In a case of 'this nature, where the practice, which has so long subsisted in 'Scotland, is said to be totally subverted by a judgment of the 'Court of Review, it is necessary that both landlords and tenants 'should be speedily acquainted with the construction to be put 'upon such clauses as are now in question, and that some mea- 'sures should be adopted to protect the rights of the tenants, as, 'if they shall be compelled to consume the fodder of their last 'crop upon the ground, surely the landlord must be compelled to 'find the means of doing so; as it frequently happens, even in more 'southern parts of Scotland than where the barony in question

'lies, that it is difficult to get the grain into the barn-yard before  
 'the term of removal at Martinmas. If, therefore, a new practice  
 'be introduced as to the consumption of the fodder of the out-  
 'going crop, it may be a matter of the most serious importance  
 'for the country, and for the Court, whether some new construc-  
 'tion of the clause as to the tenants' removal may not be devised,  
 'so as to allow them to continue in possession until Whitsunday,  
 'by which time the fodder might be consumed; and it is sup-  
 'posed that the landlord must then pay them for the value of  
 'the dung formed of that fodder, otherwise he would have a very  
 'considerable part of last year's crop of every tenant removable  
 'at Martinmas, as the tenant could not, by that term, have the  
 'means either of thrashing out the corn or consuming the fodder,  
 'which, at the time the contract of lease was entered into, could  
 'not have been in the contemplation of either landlord or tenant.'

When the case thus came before the Court, it had not been stated  
 that Anderson had subscribed the draft of the lease; and the  
 Court therefore, without giving judgment on the general point,  
 pronounced this interlocutor: 'Find that the regulations referred  
 'to not having been signed by the tenant, or even adjusted at  
 'the date of the missives of lease in question, the general reference  
 'made thereto, as in the offer of Wilkins, is insufficient to render  
 'the said regulations effectual and binding on the defender in this  
 'case, to the effect of obliging him to consume on the farm the  
 'fodder of the last or waygoing crop, as contended for by the pur-  
 'suer; and therefore repel the reasons of advocacy, and remit the  
 'case simpliciter to the Sheriff.' Against this interlocutor Colonel  
 Gordon reclaimed; and having produced evidence of Anderson  
 having subscribed the draft of the lease, the Court, on advising  
 with the Judges of the Second Division, and with the permanent  
 Ordinaries, 'in relation to the general question at issue betwixt  
 'the parties in this cause, recalled their interlocutor reclaimed  
 'against, and found that the 16th article of the general articles  
 'of lease regarding the estate of Cluny cannot be held as applying  
 'to the crop of the last year of the lease, and that the rights of the  
 'parties respecting the same must be regulated by the common  
 'law and usage of the country; and therefore repelled the rea-  
 'sons of advocacy, and remitted the case simpliciter to the  
 'Sheriff,' and found Colonel Gordon liable in expenses.\*

J. S. ROBERTSON, W. S.—CARNEGIE and SHEPHERD, W. S.—Agents.

\* For the opinions of the Judges and the authorities, see *Gordon v. Robertson*, ante, Vol. III. No. 440.

No. 13. Colonel DALRYMPLE's Trustees and Younger Children.—  
*Dean of F. Cranstown—A. Wood.*

D. CUTHBERTSON, Trustee for MARTIN DALRYMPLE's Creditors.  
*—Bell—Murray—Walker.*

Competing.

*Right in Security.*—A father having left his estate to trustees, to be conveyed to his eldest son, on condition of his paying £10,000; and he having taken possession, and made up titles to a part as heir, and having thereafter died bankrupt; found that the trustees, who had received a partial payment out of that part which remained in hereditate jacente of the father, and which they afterwards vested in themselves, were entitled to rank *pari passu* for the whole debt on that part of the estate to which the eldest son had completed his titles, to the effect of getting full payment.

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1st Division.  
 Lord Alloway.

H.

THE late Colonel Dalrymple, besides possessing an entailed estate, held several heritable properties in fee-simple. In 1787 he executed a trust-deed and settlement, by which he authorized trustees to convert his fee-simple properties into money for behoof of his younger children. In February 1794, he executed a supplementary trust-deed, by which he appointed them to dispose the lands to his eldest son, Martin Dalrymple, on condition that he should grant an heritable security over them for £10,200, payable to them on behalf of the younger children of the family. Colonel Dalrymple died soon thereafter, and Martin Dalrymple immediately entered into possession of all the fee-simple estates; and subsequently he completed his titles, as heir of his father, to a part of them. The trustees took no measures for vesting the property in themselves; and, in this situation of matters, Martin died bankrupt in 1809. A meeting of his creditors was held in 1810, at which appearance was made for Colonel Dalrymple's younger children; and it was agreed (in order to save the expense of diligence) that the respective rights of parties should be held to be the same, in competition with each other, as they stood at the period of Martin Dalrymple's death, and as if each had done complete diligence. Thereafter the trustees of the children made up titles, by adjudication in implement, in virtue of the trust-deed of 1787, to those parts of the estate which had not been taken up by Martin, and which consequently remained in hereditate jacente of Colonel Dalrymple. This they did by obtaining a decree of constitution against the son of Martin Dalrymple, by charging him to enter heir to his father, and to his grandfather, the Colonel, and by adjudging in implement of the trust-deed. A dispute having thereafter arisen between the creditors of Martin Dalrymple and the trustees of the children, relative to the

right of the former to rank on that part of the property which had been so taken up by the trustees, the question was brought before the late Lord Meadowbank, who found, ' That the said trustees and family are preferable upon the heritable subjects which belonged to the said Colonel William Dalrymple, and to which the said Martin Dalrymple did not make up titles, where titles were necessary for vesting the same in his person ; and that the said trustees and family and creditors of the said Martin Dalrymple are entitled to rank *pari passu*, in proportion to their debts, upon the heritable subjects which belonged to the said Colonel William Dalrymple, to which the said Martin Dalrymple did make up titles, or to which titles were not necessary for vesting the same in his person.' These findings were acquiesced in by both parties ; and the subjects were afterwards brought to sale. The trustees of the children received a partial payment of their debt out of that part of the estate to which they had made up titles ; and they claimed to be ranked *pari passu* with the creditors of Martin, for their full debt, upon the part of the estate to which he had completed titles, without deducting what they had received, to the effect of obtaining once and single payment of their whole debt. This having been resisted by the creditors, a multiplepinding was brought, in which Cuthbertson, as trustee for the creditors, contended, 1. That, by the judgment of Lord Meadowbank, the trustees of the children were bound to deduct the payments which they had received from the trust-estate ; and, 2. That as there were two debtors,—the Colonel on the one hand, and Martin on the other,—and two separate estates,—the one belonging to the Colonel, and the other to Martin,—they were bound, on general principles of law, to make that deduction. To this it was answered, 1. That the interlocutor of Lord Meadowbank was not intended to settle this question, but merely whether the creditors were entitled to rank on any part of the trust-estate ; and, 2. That there were not two debtors, nor two separate securities, because the debt was due by Martin alone, as representing his father, and the security extended over his whole estate ; and the circumstance of one part having been held by him on complete titles, and the other on apparency, could not constitute two separate estates. They therefore contended, that on the principle of the cases of the Earls of Loudoun and Glasgow, and of the creditors of Auchinbreck, they were entitled to rank for their full debt. The Lord Ordinary found, that, ' in the circumstances of this case, and according to the import and effect of the interlocutors of the late Lord Meadow-

‘bank, now final and acquiesced in by the parties, the trustees for Colonel Dalrymple, in claiming on the funds of Martin Dalrymple, must deduct the prices received or to be received by them from those parts of the Colonel’s property which they have sold, and the prices of which they are, in terms of Lord Meadowbank’s interlocutor, entitled to receive; and that they are entitled to rank only for the remainder.’ To this interlocutor the Court, by a majority, adhered; but thereafter altered, and found that ‘the petitioners, as trustees for the surviving children of the late Colonel Dalrymple, are entitled to be ranked, *pari passu* with the creditors of Martin Dalrymple, upon the price of those parts of the estate of Colonel Dalrymple to which Martin Dalrymple made up titles, for the whole balance or provisions due to those children at the time of Martin Dalrymple’s death, and that without deduction of the prices received or to be received by them out of those parts of Colonel Dalrymple’s property, over which they were found, by the interlocutors of Lord Meadowbank, to have a preference.’ And to this interlocutor the Court afterwards adhered.

The Court were ultimately satisfied that the judgment of Lord Meadowbank did not regulate the present question; and they were also of opinion, that the decisions pronounced in the cases of the Earls of Loudoun and Glasgow, and the Creditors of Auchinbreck, were well founded; but a difference existed on the Bench, as to whether they were applicable,—some of the Judges holding that there were here two separate debtors, and two separate securities. The majority, however, being of opinion that there was only one debtor and one security, held that the above decisions must form the rule in deciding this case.

*Trustees’ Authorities.*—Earls of Loudoun and Glasgow, Feb. 16. 1684, (14114); Creditors of Auchinbreck, July 21. 1758, (14129); Douglas, Heron, and Company, August 2. 1781, (14181); Creditors of Grant, March 2. 1791, (14189.)

*Creditors’ Authorities.*—2. Ersk. 12. 66; Pr. of Eq. 122; 2. Bell, 286.

A. SWINTON, W. S.—D. CLEGHORN, W. S.—Agents.

W. NAPIER and Others, Suspenders.—*Moncreiff—Ivory.*

No. 14.

K. WOOD and Others, Chargers.—*Skene—Montcith.*

*Insurance.*—Held that the overturn of a vessel in a dry harbour, occasioned partly by accident, and partly by the state of the weather, by which damage was sustained, was within the usual general terms of a policy of insurance.

NAPIER and others, underwriters in Glasgow, along with certain underwriters at Lloyd's, subscribed a policy of insurance on the brig *Industry*, belonging to Wood and others, 'lost, or 'not lost, at and from Oporto to St. John's, New Brunswick, 'while there, and at and from thence to Liverpool.' The risks insured against were the usual 'perils of the seas, men of war, 'fire, enemies, pirates, rovers, thieves, jettisons, letters of mart 'and countermart, surprisals, takings at sea, arrests, restraints, 'and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and 'mariners, and of all other perils, losses, and misfortunes that 'have or shall come to the hurt, detriment, or damage of the 'said goods and merchandises, and ship, &c., or any part thereof.' When the *Industry* reached St. John's, (the harbour of which is a dry harbour,—that is, a harbour which is left dry at every ebb tide,)—she was moored alongside the Market Wharf, where she discharged her cargo. After her ballast had been taken out, preparatory to loading a new cargo, she was, by orders of the harbour-master, removed from her station next the wharf, to make way for the *True Briton*, a vessel of considerably larger size and broader build, on the off side of which she was placed, contrary to the remonstrances of the captain. The usual precaution of giving both vessels a list inwards, by means of cables attached to the vessels from the wharf, was duly attended to; but no other means were employed to secure them from falling over when left dry by the tide, nor did it appear that any other precautions were customary. On the side of the wharf were wooden fenders, forming a sort of frame-work, by which the vessels were supported when leaning towards the wharf. During some squally weather, these fenders suddenly gave way while the tide was ebbing; and the *True Briton*, in consequence, fell inwards, to a certain extent, towards the wharf. By this accident her bilge was thrown outwards, which pressing against the *Industry*, raised that vessel upright on her keel. Lashings and tackles from the wharf were immediately made fast to the *Industry*; but the pressure of the *True Briton* increasing as the tide fell, they gave

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2D DIVISION.

Admiralty.

M'K.

way, and the *Industry*, which was a very sharp-built vessel, fell over, while there were only three feet of water under her. It was found impossible to raise her up, and she filled with water next tide. On a survey, she appeared to have been so much injured by the fall, as to render it advisable to have her sold. This was accordingly done, and a demand for the loss made on the underwriters. The insurers at Lloyd's immediately paid their proportion; but Napier &c. having refused to do so, the owners raised an action against them before the Judge-Admiral. In defence, it was pleaded, 1. That the loss did not arise from any peril of the sea, and was not covered by the policy; and, 2. That the accident had happened in consequence of the negligence of the master and crew. The Judge-Admiral allowed a proof, which established the above circumstances; and, on advising it, he decreed against Napier &c. A bill of suspension having been presented by them, the Court refused it; and they afterwards refused a reclaiming petition without answers, in which Napier &c. craved to be allowed a proof as to certain further new allegations of negligence on the part of the master.

The Court were satisfied that there was no negligence, or want of due precaution, on the part of the master and crew, and were unanimously of opinion that the risk was covered by the policy. In reference to the demand for a new proof, the Court held that it was totally inadmissible at this late stage of the cause, especially as one of the general averments formerly admitted to proof was the negligence of the master.

*Suspensers' Authorities.*—*Thomson v. Whitmore*, 3. Taunton, 227; *Rowercraft v. Dunsmore*; *Hearne v. Edwards*; 1. Broderip and Bingham, 388.

*Chargers' Authorities.*—1. Marshall, 214, 218; 1. Park, §1. 102; 3. Pothier, 18; Abbott, 366; Pothier Trait. d'Assur. 18; 1. Emerigon, 412; *Carruthers v. Sydebotham*, 4. Maule, and Sel. 77; *Fletcher v. Inglis*, 2. Barn. and Ald. §15; *Phillips v. Barbour*, 5. Barn. and Ald. 161.

MACMILLAN and GRANT, W. S.—GIBSON-CRAIGS and WARDLAW,  
W. S.—Agents.



J. M'PHERSON, Pursuer.—*Pyper*.  
H. W. CAMPBELL and Others, Defenders.

No. 15.

*Messenger's Cautioners*.—Held that the cautioners of a messenger were not liable in the expenses of an action against him for a breach of duty, to which they were not called as parties.

M'PHERSON brought an action against Dickson, a messenger at arms, for neglect of duty, in which he obtained decree, with expenses. He then raised an action against Campbell and others, who were cautioners for Dickson, concluding, not only for the principal sum in the decree, but also for the expenses which he incurred in obtaining it. In support of this latter claim, he founded upon the bond of caution, by which they bound themselves to pay 'what damage, interest, and expenses any of them (the lieges) shall happen to sustain through the negligence, 'fraudful or informal execution of the said John Dickson.' To this Campbell and others pleaded in defence, that they ought to have been called as parties to the original action, so that they might have had an opportunity of putting an end to it by paying the principal sum;—that they were not aware of it till its termination,—and that, so soon as they were informed of it, they had declared their willingness to pay the principal debt. They therefore insisted that they were not liable in the expenses of that action. Lord Alloway, 'in respect that the defenders have 'always offered to pay the original sum claimed by the pursuer 'as the alleged loss occasioned by the negligence of the messenger for whom they were cautioners,' decerned against them for that sum; but found them 'not liable in the expenses incurred 'in the action against Dickson the messenger, in which they were 'not called in the usual manner as parties, and of which they 'were totally ignorant, and which they might at once have put 'an end to, if they had been acquainted with it, by payment of 'the debt; and therefore assolizied them from that claim.' To this interlocutor Lord Eldin adhered; and the Court refused, first a full petition without answers, and thereafter a short petition praying for a diligence against havers, to show that the defenders were not ignorant of the existence of the action.

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Lords Alloway  
and Eldin.  
S.

*Pursuer's Authorities*.—Grant, July 8. 1758, (2081, Aff. March 7. 1759); 1. St. 17. 4; Bello, Feb. 26. 1627, (2074); 3. Ersk. 3. 61; Allan, June 17. 1663, (2088); Alexander, Dec. 6. 1671, (2089); Hamilton, June 18. 1706, (2091); Wilson, Jan. 31. 1817, (F. C.)

D. CHRISTIE,—J. BLAIR, W. S.—Agents.

No. 16.

JAMES DUFF, Pursuer.—*Cockburn—Rutherford.*Mrs. BRADBERRY, Defender.—*More—Marshall.*

*Reparation—Damages.*—Held that an averment, that an arrestment on the dependence of an action, and a warrant to apprehend as in meditatione fugæ, were illegal, nimious, and oppressive, was not relevant, malice not being alleged, and the action having in part been decided against the party.

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1st Division.

Lord Meadowbank.

H.

THE defender, Mrs. Bradberry, let to Duff the Britannia Inn, Leith, for eleven years from Whitsunday 1818, excluding assignees and subtenants during the first six years; and declaring, that thereafter the subset was to be made to 'any person of respectable character, who is in good circumstances.' About two years prior to the expiration of this prohibition, Duff proposed to subset the inn to Adam Kay, and, after a good deal of correspondence, this was agreed to by Mrs. Bradberry, on condition of Duff remaining bound for the rent, and a cautioner being found for the regular payment of it. Kay was accordingly put into possession, but soon thereafter the cautioner became bankrupt. Mrs. Bradberry then brought an action, concluding that Duff should be ordained, either to grant a proper deed signed by himself, the subtenant Kay, and a responsible cautioner, to pay to her the rents in terms of the lease,—or otherwise, that Kay should be ordered to remove, and Duff to enter into possession; and that, in either event, Duff should be decerned to pay £1000 of damages. At this period no rent was due; but, on the dependence of this action, Mrs. Bradberry executed arrestments of funds belonging to Duff; and having learned that he meant to leave Scotland, she applied for and obtained a warrant to arrest him as in meditatione fugæ. He was accordingly apprehended, and stated that he proposed to go to London with his wife and family on private business, but that it was his intention immediately to return to Scotland, where he carried on business as a coachmaster. He was appointed to find caution judicio sisti, which he did; and the arrestments of his funds were loosed on caution. After the Lord Ordinary had decerned in terms of the first alternative conclusion, Kay the subtenant became bankrupt, and absconded. Duff then intimated his intention to possess the inn himself; and having thereafter petitioned, and explained the change of circumstances, and that the period for subsetting was now arrived, as permitted by the lease, the Court recalled the interlocutor of the Lord Ordinary, and found 'that Duff, the petitioner, is bound to occupy the inn as an inn himself, or find a sufficient subtenant to oc-

'copy it as such, and that Adam Kay was not a sufficient sub-tenant;' and therefore found him liable in the expenses prior to the Lord Ordinary's interlocutor. No decision was given on the conclusion for damages; and this process being considered as at an end, Duff raised an action of damages against Mrs. Bradberry, in which, after narrating the circumstances, and that no rent was due, and that he had never refused to implement any of the obligations incumbent on him by the lease, he averred that the arrestments of his funds, and his apprehension under the meditatione fugæ warrant, 'were nimious, illegal, and unwarrantable, and that they had greatly hurt the pursuer in his interest, character, and feelings.' In defence, Mrs. Bradberry contended, that the summons was irrelevant; 1. Because, as it was legal to arrest upon the dependence, and also to apply for the meditatione fugæ warrant, it was necessary to aver malice, which was not done; and, 2. Because the action which gave rise to these proceedings was decided against Duff, and therefore he was not in the situation of a party against whom an unfounded action had been brought. The Lord Ordinary having reported the case, the Court, on advising minutes and additional minutes, found that 'the allegations of the pursuer are irrelevant;' and therefore assolvied Mrs. Bradberry, and found her entitled to expenses.

**LORD PRESIDENT.**—There is no offer here to prove malice. It is true, the pursuer says that the proceedings were nimious, illegal, and unwarrantable; but they could not be illegal, because every thing was done agreeably to law; and they could not be unwarrantable, because there was proper authority for the execution of the diligence.

**LORD HERMAN.**—The proceedings are alleged to have been nimious and oppressive; and this is an action of damages which must go to the Jury Court. It is averred that nothing was due; and, in considering the relevancy, we must hold that averment to be true. Now, is it legal to take out a warrant to apprehend a man, as in meditatione fugæ, where not a shilling is due?

**LORD PRESIDENT.**—The pursuer, however, admitted that he was going to leave the country; and the conclusions of the action were to implement certain specific obligations.

**LORD BALGRAY.**—The defender was entitled to do all she had done, and it appears from the whole circumstances of the case, that she was the party who had been oppressed.

**LORD CRAIGIE** was of opinion that the allegations of the summons were not relevant, and that all the proceedings were consistent with law.

**LORD GILLIES.**—The defender was entitled to arrest on the dependence, and it would be absurd to allow an action of damages for executing a diligence authorized by law. With regard to the meditatione fugæ warrant, if the pursuer had been assoilzied, the case might have been different, and the proceeding would have been unwarrantable. In that event, it would have been for a jury to have said whether it was done in bonâ fide or in malâ fide; but judgment was pronounced against the pursuer.

J. YOUNG,—C. SPENCE,—Agents.

No. 17.

JAMES M'BRAIRIE, Suspender.—*Fullerton—Skene.*  
G. and W. HAMILTON, Chargers.—*Ro. Bell—Craigie.*

May 19. 1825.

1st Division.

Admiralty.

D.

THIS was a question of a special nature, relative to the relief of Hamiltons, who had been employed as agents by a company (of which M'Brairie was the surviving partner) to charter a vessel, and who had been subjected in damages for a breach of the contract. The Judge-Admiral found M'Brairie liable to relieve Hamiltons; and the Court refused a bill of suspension.

D. GREIG, W. S.—W. BELL, W. S.—Agents.

No. 18.

A. HOUSTON, Pursuer.—*Gillies.*  
WILLIAM YUILL, Defender.—*Cockburn.*

May 19. 1825.

2d Division.

Lord Mackenzie.

B.

*Sexennial Prescription.*—DECREE of absolvitor of Yuill, the representative of Houston, the joint acceptor of a bill in favour of Houston, which was prescribed, Yuill having deponed that he was ignorant even of its existence till after the lapse of the years of prescription.

*Pursuer's Authorities.*—4. Ersk., 2. 14; Irving, Feb. 16. 1675, (12033); Littlegill, Feb. 1682, (12085.)

J. STUART,—M'CHETNE and MACKGLASHAN,—Agents.

No. 19.

J. DICKSON, Pursuer.—*Maidment.*  
A. DICKSON, Defender.—

May 20. 1825.

1st Division.

Lords Alloway and Eldin.

H.

THE pursuer having brought an action of accounting against the defender, on the allegation that he was a partner in certain concerns along with the latter, the question resolved into one of fact. The Lord Ordinary assoilzied the defender, and the Court adhered.

J. J. FRASER, W. S.—A. GREIG, W. S.—Agents.

P. G. SKENE, Pursuer.—*Sol.-Gen. Hope—Keay—Cheape.*

No. 20.

JAMES GREENHILL, Defender.—*Cockburn—Gillies.*

*Landlord and Tenant—Lease.*—Held that a tenant having, in terms of a permission in his lease, assigned it to one of his sons, and the landlord having by his acts and deeds approved of the assignee, all claims against the original tenant and his representatives were discharged.

IN 1806, the late Mrs. Skene, grandmother of the pursuer, granted a lease of the farm of Easter Gask, for 31 years, to the late Peter Greenhill and to his heirs, 'secluding assignees and subtenants; excepting that it shall be lawful and competent to the said Peter Greenhill to sublet or assign to any of his sons, providing that he shall give said son a sufficient stocking, corresponding to the extent of the farm.' Greenhill, on the other hand, bound himself, 'his heirs, executors, and successors,' to pay a rent of £530. In the year 1808, he executed an assignation of the lease to his second son Charles, to take effect at his own death, which happened shortly thereafter. Charles then entered into possession,—was acknowledged as tenant by the landlord,—paid the rents, and obtained receipts in his own name alone; but having fallen into arrear of rent in 1822, the landlord raised an action, concluding for payment, not only against him, but also against James Greenhill, the heir and representative of Peter Greenhill, the original tenant, on the ground, that although the original tenant could validly transfer to his second son the rights competent to him as tenant, he could not free himself, 'his heirs and successors,' from the obligations imposed on them in favour of the landlord by the lease. The Lord Ordinary having reported the case, the Court found, 'That after an assignation of a lease has been regularly executed, and duly intimated to and acquiesced in by the landlord, and the assignee admitted into possession, the obligation of the cedent for rents is limited to those due prior to the possession of the assignee; and, therefore, as well as in respect of the special circumstances of this case,' sustained the defences, and absolved the defender.

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2d Division.  
Lord Cringletie.  
M.K.

LORD ROBERTSON stated, that he had often heard it explained from the Bench, that the difference between a sublease and an assignation is just this—that in the former the principal tenant and subtenant are both bound, but in the latter the landlord accepting the assignee passes from all claim against the cedent; and that this was the general understanding of the country.

LORD GLENELG.—When the landlord is a direct party to the assignation, and accepts the assignee, the liability of the original tenant

ceases. It was always formerly held on the Bench, that the opinions of Bankton and Erskine were erroneous; and the very nature of the thing implies that the cedent must be free. Lease is a mutual contract; and if the landlord consents to a substitution, there is an assignation on the one hand, and a delegation on the other. It is unnecessary to say what would be the case in those instances where the landlord's consent may be held not necessary to an assignation, as the circumstances here are totally different.

**LORD PITMILLY.**—Even if the general principle were doubtful, the specialities in this case are sufficient to carry it in favour of the defender.

**LORD ALLOWAY** concurred. Lease is a real right, and not assignable without consent of the landlord; and although he might not be obliged to receive a bankrupt, even where assigning is permitted, yet when he has received the assignee, the cedent is no longer bound.

**LORD JUSTICE-CLERK.**—The dicta of Bankton and Erskine were reprobated in the case of Low, and they are not supported by the case of Braco, on which they are founded. There is a manifest distinction between a sublease and an assignation; and when the assignation is permitted and intimated, and the assignee received, the cedent is freed from his obligations.

*Pursuer's Authorities.*—3. Stair, l. 2; 2. Ersk. 6. 34; 2. Bankton, 9. 14; Braco, Kilk. v. Tack, No. 2.

*Defender's Authority.*—Dictum of Court in Low, July 5. 1796, (18373.)

J. THOMSON, W. S.—W. SPALDING,—Agents.

No. 21.

W. BLACKWOOD and Others, Pursuers.—*Forsyth—Baird.*

G. BELL, Defender.—*Dean of F. Cranstoun—Murray—Ivory.*

*Property—Servitude—Personal Objection.*—Circumstances in which it was held that a superior who had feued land for villas, was not barred from erecting buildings which tended to prevent the feuars from having extensive views from their windows, on the faith of which they alleged they had contracted.

May 20. 1825.

2d DIVISION.  
Lord Mac-  
kenzie.

B.

IN 1806, Mr. Bell, the proprietor of the lands of Newington in the vicinity of Edinburgh, advertised parts of them to be feued for villas, stating them 'to command very beautiful and extensive prospects.' Articles of sale, by public roup, were afterwards drawn up, one of which provided, that 'in order to preserve the view of distant objects as much as can be done to every house,' the houses should be placed over against the intervening spaces, between those on the opposite side of the road. The lands exposed to sale by these articles were those portions of Newington 'marked with blue outlines' on a plan referred to. This plan contained the whole of the lands of Newington, the

parts intended to be feued being bounded by a blue line. One lot only was sold by public roup, but several others were feued out subsequently, the dispositions of which bore reference to this plan. In 1807, the greater part of the property not included by the blue line on the plan was feued to Sir George Stewart, who was expressly bound by his feu-contract not to sell or subfeu for the purpose of building. After this sale to Sir George Stewart, several other lots within the blue lines were feued by Mr. Bell; but, except in one instance, there was no reference in the titles to the plan or articles of roup. In 1824 Mr. Bell re-acquired the property feued to Sir George Stewart, and it was consolidated with the superiority still in his person, by a resignation *ad remanentiam*. Having proposed to feu this property in lots for building, Mr. Blackwood and others, feuars of the lots within the blue line on the plan, raised an action to have it declared that Mr. Bell was not entitled to erect any buildings, except to the extent allowed in the feu-contract to Sir George Stewart; and they contended, 1. That, by the reference to the plan and articles of roup, he had created an understanding among the feuars that the rest of the property was not to be feued for building, and that he was therefore barred *personali exceptione* from doing so; and, 2. In reference to those who had obtained their feus subsequent to the date of Sir George Stewart's contract, that they, having taken their feus from Mr. Bell at a time when it appeared from the record that the rest of the property could not be built on, had acquired a right to the benefit of the restrictions in Sir George's contract, which could not be defeated by a resignation *ad remanentiam*. The Lord Ordinary assoilzied Mr. Bell, and the Court unanimously adhered.

The Court were of opinion, that the restrictions in Sir George Stewart's contract were for the benefit of the superior alone, and conferred no right on the feuars; and they considered the other pleas to be totally untenable.

J. R. SKINNER, W. S.—W. BELL, W. S.—Agents.

No. 22. GEORGE LOCKWOOD and Company, Suspenders.—*Jeffrey—Buchanan.*

R. DAVIDSON, Charger.—*Cockburn—Maidment.*

*Multiplepointing—Title to Pursue.*—A claimant in a multiplepointing having been preferred, and having received payment of the fund in medio from the holder, under a warrant for execution pending an appeal by a competing claimant, and on granting bond to the holder to repeat in case of a reversal,—found that the judgment having been reversed, and further proceedings ordered, the competing claimant was entitled to demand consignation, although no appearance was made by the holder, to whom the bond had been granted.

May 24. 1825.

1st Division.

Lord Eldin.

S.

DAVIDSON, the indorsee of a bill, charged Robertson and Carlier, as partners of Robertson and Company the acceptors, and also Lockwood and Company, as drawers and indorsers, to pay the amount. Lockwood and Company, holders of another bill, which was precisely in the same terms as the one held by Davidson, at the same time charged Robertson and Carlier, as representing Robertson and Company, the acceptors. Robertson and Carlier brought suspensions of both charges,—Carlier denying that he was a partner of Robertson and Company,—and Robertson alleging that one of the bills was not genuine, and that he was ready to make payment of the one which was so. With this view, he raised a multiplepointing. Lockwood and Company also suspended the charge by Davidson, stating that the bill held by him had been acquired by means of a fraudulent contrivance between him and Mason, Baird, and Company, who were in the practice of acting as their agents, and who, after drawing on Robertson and Company, and obtaining their acceptance as in favour of Lockwood and Company, indorsed it to Davidson's brother, as per procurator of them, but without having any authority to that effect; and that it had then been indorsed to Davidson. These suspensions were conjoined with the multiplepointing, in which both Davidson and Lockwood and Company entered claims; but no order to consign was issued. Lord Hermand suspended the letters in all the suspensions of Davidson's charge; found the letters orderly proceeded in the suspension by Robertson against Lockwood and Company; and, in the multiplepointing, preferred that company to the fund in medio. To this judgment the Court, on the 16th January 1812, adhered. Davidson then appealed to the House of Lords, who, on the 4th July 1815, reversed the interlocutors, and remitted with instructions to receive evidence, which had been offered by Davidson, to instruct that Mason, Baird, and Company had such authority from Lockwood and Company



as enabled them to indorse the bill, and thereby to bind them for payment of its amount. After this appeal had been entered, Lockwood and Company obtained warrant for interim execution against Robertson, as holder of the fund in medio, and recovered the amount; for repayment of which, in the event of a reversal, they granted bond to Robertson, and they also in the same way recovered payment of the expenses of process from Davidson. A reduction of Davidson's bill had also been instituted in the mean while by the trustee for Mason, Baird, and Company, in which he obtained decree. Davidson having petitioned the Court to apply the judgment of the House of Lords, and award repetition of the expenses, they recalled the interlocutors appealed against; but, 'in respect the bill is now reduced and set aside, they find it unnecessary to proceed in the remit from the House of Lords.' Davidson again appealed, and the House of Lords, on the 15th June 1824, found 'that the Court of Session ought to have applied the judgment of this House in terms thereof; and as, by that judgment, the interlocutor of the 16th January 1812 was, with other interlocutors, reversed, the appellant, upon the cause being remitted to the Court of Session according to the said judgment, was entitled to a repetition of the costs paid by him in pursuance of that interlocutor.' It was therefore ordered, that the interlocutors complained of should be reversed, and that the Court should proceed according to the judgment of the 4th July 1815. This judgment was then applied; and a remit having been made to Lord Eldin, Davidson insisted that Lockwood and Company were bound to consign the fund which had been recovered by them from Robertson, the raisers of the multiplepoinding. This they resisted, on the ground that, as the demand for repetition could only be enforced in virtue of the bond, Davidson had no title to require it, seeing that it was in favour of Robertson. To this it was answered, that as he was a claimant in the multiplepoinding, and as Lockwood and Company had got the fund in medio from Robertson, they were identified with him, and were bound to consign it. The Lord Ordinary ordained them to make consignment, and the Court adhered.

**LORD BALGRAY** held, that as there had never been any order against Robertson to consign the money, it had never been in *manibus curiæ*; and, therefore, that having been paid to Lockwood and Company in virtue of the bond, repetition could only be obtained at the instance of the party who was creditor in the bond.

The LORD PRESIDENT was of opinion, that Lockwood and Company were identified with Robertson; and that as it was competent to ordain him, to consign, so it was equally competent to order Lockwood and Company to make consignment of the fund in medio which they had received from him.

LORD GILLIES observed, that Lockwood and Company received payment by virtue of a judgment which had been reversed; and that, consequently, they had no longer any title to hold the money:—that it was the duty of the Court to restore matters to their original situation; and that they were not prevented from doing so by the bond having been granted to Robertson, which was a precaution adopted by the Court, to preserve entire the rights of parties.

LORD HERMANN doubted the justice of the decision of the House of Lords, and of the principles of law on which it was founded; and was of opinion, that as the bond was in favour of Robertson, he alone could demand repetition.

LORD CRAIGIE agreed with the Lords President and Gillies.

T. MEGGET, W. S.—C. F. DAVIDSON, W. S.—Agents.

No. 23.

ANN HOME, Pursuer.—*Baird*.  
D. HENDERSON, Defender.—*Gordon*.

*Small Debt Act*.—Found, that it was a sufficient objection to a decree of the Justices under the Small Debt Act, that the witnesses had not been put on oath.

May 24 1825.

1st Division.

Lord Eldon.

8.

HOME raised an action of reduction of a decree for £5, pronounced by the Justices of Peace of the Alford district of Aberdeenshire, acting under the Small Debt Act, at the instance of Henderson, on the ground, 1. That the Justices had admitted witnesses, who, from their near relationship to Henderson, were incompetent; and, 2. That these witnesses had been examined without being put upon oath. This latter allegation was admitted by Henderson; but he pleaded, 1. That the action was incompetent; and, 2. That there was no evidence that the Justices proceeded on the testimony of the witnesses; that they had sufficient materials for deciding the cause, from the statements of the respective parties; and that it was the practice in that part of the country to avoid, as much as possible, obliging witnesses to make oath. The Lord Ordinary decerned in the reduction, and the Court adhered.

The LORD PRESIDENT was of opinion, that as it was admitted that the witnesses had been examined without being put upon oath, this was a sufficient objection to the decree.

LORD HERMAND observed, that if the practice were as alleged by Henderson, the sooner it was stopped, the better.

LORD BALGRAY held that the Justices were not entitled to deviate from the general rules of law, and that they were bound to have put the witnesses on oath.

The other Judges concurred.

J. R. SKINNER, W. S.—J. LYALL,—Agents.

G. SKELTON, Suspender.—*Cunninghame*.

No. 24.

JEAN HUTCHISON, (Executor of J. STEPHEN,) Charger.—  
*J. Henderson Jun.*

THIS was a suspension of a decree pronounced by the Judge-Admiral for a sum of money, being the wages of the late J. Stephen, as mate of a ship belonging to Skelton. The decision of the case depended in a great measure on written evidence, and the Court refused the bill.

May 24. 1825.

1st Division.  
Admiralty.  
H.

FALCONER and JOHNSTON, W. S.—C. F. DAVIDSON, W. S.—Agents.

S. D. ELLAM, Pursuer.—*Matheson*.

No. 25.

J. KING, Defender.—*Cunninghame*.

*Expenses*.—Circumstances under which a pursuer was found liable in the previous expenses.

ELLAM brought an action on a bond granted by Bird against King his representative, guaranteeing implement of two bonds by William Lang and Company of Tobago, now insolvent; and on this action he executed inhibition and arrestment. King, inter alia, objected that the bonds by Lang and Company were not produced; and, on the 31st January 1824, the Lord Ordinary appointed Ellam to produce the bonds on or before the first sederunt day of May next. He failed to do so, and decree of absolver was pronounced. He then represented, and moved for a diligence to recover the bonds. The Lord Ordinary granted it before answer, on condition of payment of the previous expenses. Of this condition Ellam complained, but the Court adhered.

May 24. 1825.

1st Division.  
Lord Meadowbank.  
H.

G. VETICH, W. S.—W. YOUNG, W. S.—Agents.

No. 26.

The DUKE of ARGYLL, Complainer.—*Moncreiff—Fletcher.*  
 J. W. JOHNSTON, (M'ALPINE's Trustee,) Respondent.—  
*Cunninghame.*

*Implied Condition—Bankrupt.*—A party having contracted to purchase kelp at £8 per ton, and a compromise having been afterwards entered into, and having become bankrupt, whereby he was unable to implement the terms of it, found that the creditor was entitled to rank on his estate under the original contract.

May 24. 1825.

1st Division.  
 D.

M'ALPINE contracted to purchase the whole of the kelp belonging to the Duke of Argyll, which should be made in the Island of Tyrie during 1821, at £8 per ton. In terms of the bargain, he received delivery without objection; but having afterwards complained of the hardship which he sustained from the fall of the market, and that part of the kelp was not good, it was arranged that he should at all events pay £2300, and account for any surplus which might be realized. He accordingly paid £1448: 13: 8 to account, and granted his bill for £941: 6: 4, making in all £2300. Before the bill was payable, he became bankrupt, and his estates were sequestrated. The Duke of Argyll then claimed to be ranked for the full value of the kelp, in terms of the original contract, by which a large additional sum was due to him. The trustee having rejected the claim in respect of the arrangement, the Duke complained to the Court, contending that as the agreement had been entered into on the faith that M'Alpine would be able to implement it; and that as he had been unable to do so in consequence of his bankruptcy, it was thereby put an end to, and the original contract revived. The Court altered the judgment of the trustee, and appointed the Duke to be ranked in terms of his claim.

J. and W. FERRIER, W. S.—GREIG and PEDDIE, W. S.—Agents.

No. 27.

W. JEFFREY, Pursuer.—*Sol.-Gen. Hope—Greenshields.*  
 CHILDREN of A. CAMPBELL, Defenders.—*Moncreiff—W. Bell.*

*Reduction on the Stat. 1621, c. 18.*—Provisions to a wife and children; of an adequate nature, made by a person who was at the time solvent, sustained.

May 24. 1825.

2d Division.  
 Lord Robertson.  
 M'K.

JEFFREY, as trustee for the creditors of Campbell, brought an action for reducing a postnuptial contract of marriage, whereby Campbell had, about four years prior to his bankruptcy, settled certain heritable subjects on his wife and children. It was ad-

mitted that this property very little exceeded the value of the portion received with his wife; and the Court, after an investigation as to his solvency at the date of the contract, being satisfied that there was no fraud on his part, and that he had been perfectly solvent, adhered to the Lord Ordinary's interlocutor, repelling the reasons of reduction.

J. THORBURN,—CAMPBELL and MACDOWALL,—Agents.

J. COOPER, Advocate.—*Pyper.*

No. 28.

J. LESLIE, Respondent.

*Promise.*—A letter by a landlord, promising to a party the first and last offer of a farm, not binding to the effect of compelling him to let the farm, or subjecting him in damages.

THE farm of Brankston, belonging to Leslie, was possessed by Dufton on a lease, of which, in 1819, there were five years to run. In October of that year, Leslie gave to Cooper the following letter: 'I hereby promise you the first and last offer of Brankston at the expiry of John Dufton's lease, if he does not incline to keep it.' The meaning of this promise, as alleged by Cooper, was, that he was to have the privilege of making the first offer for the farm; and if that was rejected, that he should be entitled to have it, if he should agree to give the highest rent which should be made in the last offer to the landlord. In 1824, and before the term of removing had arrived, Dufton gave to Cooper this document: 'James Cooper in Headtown having received a letter from Mr. Leslie, Balquhain, upon the farm of Brankston, at the end of my tack I give up my right of it to him.' Cooper then made an offer for the farm, and referred to the promise which Leslie had made in 1819. Leslie, however, refused to receive the offer, stated objections to Cooper's character, and afterwards let the farm to another tenant. Cooper thereupon raised an action against him before the Sheriff of Aberdeen, concluding that he should be ordained either to implement the bargain in terms of his promise, or pay damages for breach of agreement. The Sheriff, in reference to the defences, found, 'That the letter founded on amounted to nothing more than a promise to treat for a lease, from which it was in the power of the defender to depart; and that he did give timeous notice that he declined going farther with the treaty; and therefore assoilzied him.'—The Lord Ordinary refused a bill of advocacy, and the Court refused a petition without answers.

May 26. 1825.

1st Division.  
Bill-Chamber.  
Lord Medwyn.  
D.

*Advocate's Authorities.*—Ferguson, Dec. 23. 1748, (8446); Muirhead, Aug. 10. 1759, (8444); Lawson, June 28. 1699, (8402); Walker, June 18. 1823, (ante, Vol. II. No. 860.)

P. DANIEL, W. S.—

—Agents.

No. 29. JOHN CARBUTHERS, Pursuer.—*Baird—Jameson—Henderson.*  
ROBERT STOTT and Others, Defenders.—*Dean of F. Cranstoun*  
—*Fullerton—Keay.*

*Sale—Stat. 1695, c. 24.*—Circumstances under which a purchaser of an estate at a judicial sale was held bound, although there was a defective title.

May 26. 1825.

1st DIVISION.  
Lord Meadow-  
bank.  
8.

JEAN FERGUSON, the wife of Andrew Beveridge, was proprietrix of Newtownrigg and Four-merk-land. In 1757, she disposed these lands to herself and husband in liferent, for their liferent uses alienary; and in fee to Andrew Beveridge, their eldest son; whom failing, to Robert Beveridge, their second son; whom failing, to Jane, their daughter; and to their respective heirs. Andrew predeceased his parents, without issue. Robert survived them, and possessed the subjects for several years on apparenay; and he died without issue. Jane, the daughter, had married a Mr. Macmillan, and in 1786 she exped a general service as heir of provision to her mother, the liferentrix, under the above deed, instead of to Andrew, the institute;—a blunder which gave rise to this question. On the retour of this service, she made up her titles by a Crown charter of resignation, proceeding on the procuratory contained in her mother's disposition, and was thereupon infest. She had three daughters;—Anna, who was married to Dr. Crichton; Jane, who was unmarried; and Mary, who was the wife of Mr. Denniston. Mrs. Macmillan disposed Four-merk-land to herself and husband in liferent, and to Dr. and Mrs. Crichton in fee; and she conveyed Newtownrigg to herself and husband, and longest liver, in liferent, and to his heirs in fee. In virtue of this conveyance, Mr. Macmillan, as far, disposed Newtownrigg to his daughter Jane; whom failing, to his other daughter Mrs. Denniston. Jane died in 1812 without issue, and Mrs. Denniston then exped a general service to her as heir of provision under Mr. Macmillan's disposition, and was infest.

Mr. Macmillan was proprietor in his own right of Birkhall,—one half of which he disposed to Dr. and Mrs. Crichton,—and the other half to Mr. and Mrs. Denniston. A contract of excambion was afterwards executed between these parties, by which Dr. and Mrs. Crichton conveyed their half of Birkhall to Mr. and Mrs.

Denniston, in consideration of the lands of Newtownrigg, and besides granted a bond for £500. In this way, Dr. and Mrs. Crichton became proprietors both of Newtownrigg and Four-merk-land, and Mr. and Mrs. Denniston of Birkhall. This exchange took place in 1808; and in 1814 Mrs. Macmillan, the mother of these ladies, and who had a right of liferent, died.

The affairs of Dr. Crichton having become embarrassed, a process of ranking and sale of his estates, and particularly of Newtownrigg and Four-merk-land, was brought by Stott and others. During its dependence, it was discovered that the titles which had been made up to these lands by Mrs. Macmillan in 1786 were inept, by having served, not to the fiar, but to Mrs. Beveridge, who had restricted herself to a liferent; and, consequently, that the title of Dr. and Mrs. Crichton, which flowed from that of Mrs. Macmillan, was objectionable. Mrs. Denniston being now dead, her son James Denniston (who appeared as a creditor on the bond for £500) expedite a general service, as heir-portioner of provision to Andrew Beveridge, the institute in the disposition by Mrs. Beveridge in 1757, and brought a reduction of Mrs. Macmillan's titles quoad Four-merk-land, and of the disposition executed by her of that property in favour of Dr. and Mrs. Crichton, in which he obtained decree.—(See ante, Vol. II. No. 696.)

In the mean while, a memorial and abstract was laid before the Court in the ranking and sale, and it was there stated that ‘there are peculiarities in the titles of almost the whole of the subjects under sale, which, though apparently not of serious importance, might give rise to questions afterwards; and it was therefore submitted, that purchasers should be bound by the articles of roup to satisfy themselves as to the titles, before making their offers.’ The Court accordingly ordered the subjects to be sold under the following condition, inserted in the articles of roup:— ‘It is expressly declared that the purchasers shall, previous to making their offers, satisfy themselves as to the validity and sufficiency of the title-deeds and other rights to the subjects under sale; also as to the proven rentals, holdings, and deductions; and likewise with respect to the extent and measurement of the lands, and every other particular connected with the subjects under sale, as no allowance, abatement, or deduction from the prices respectively offered by them, and at which they shall be preferred to the purchases, will be made on any account or pretext whatever.’ Carruthers, at the sale which took place under these articles, purchased Newtownrigg at the price of £3030, for which he found caution; and a decree of sale was afterwards ex-

tracted. He entered into possession, and about two years afterwards, but before a title was granted, he brought a reduction of the sale, on the ground, that as the title to Newtownrigg was inept, and had been substantially found so by the Court in the question as to Four-merk-land, he was not bound to pay the price. In defence it was pleaded, 1. That he was barred from making this objection by the condition in the articles of roup; 2. That James Denniston (who alone could challenge the sale) could not object to the title of Dr. and Mrs. Crichton, because the conveyance by his mother to them was an onerous deed, and because she was an apparent heir who had been three years in possession, or at least had possessed for that period by means of her disponees, Dr. and Mrs. Crichton.—“To this it was answered, 1. That the condition in the articles of roup was inapplicable, because there was no title at all; and, 2. That the statute 1695, cap. 24. requires actual, and not constructive possession.—The Court, (by a majority,) on the report of the Lord Ordinary, and after a hearing in presence, sustained the defence, and assoilzied the defenders.

**LORD HERMAND** was of opinion, that as there was here no title at all, Carruthers could not be bound by the sale; that the title had actually been reduced, and that such an objection could not be barred by the articles of roup. With regard to the plea on the act 1695, the essential requisites were wanting, and particularly that of possession, which must be actual, and not constructive.

**LORD BALGRAY** observed, that this purchase had been made under a ranking and sale; that there had been a memorial and abstract, which is one of the most important steps of the process, and that it had been there mentioned that there were peculiarities in the titles. In consequence of this, the clause in the articles of roup was inserted; so that every purchaser was put fully on his guard. But, independently, he was of opinion that it was possible to make up a good title; and that, therefore, the question just resolved into this, whether or not the purchaser was bound to be at this expense? which he clearly was under the articles of roup. He also thought that the plea on the act 1695 was good, because the possession was obtained under an excambion, which was an onerous deed; that Mrs. Denniston had possessed by her disponees for more than three years, and that her son, who represented her, could not pass by her, without being bound by her acts.

**LORD CRAIGIE** thought that an effectual title could not be made up, so as to secure the purchaser; and that as there was in truth no title whatever, the purchaser could not be bound by the articles of roup.



**LORD GILLIES** was of a different opinion ; and observed, that there might perhaps be some difficulty in pointing out the mode of curing the title, but that there could be no doubt that the substantial right to the property belonged to Mrs. Crichton ; and that it would be a libel on the law to say, that where a party had a legal right to property, there was no mode of completing the title. There was here no fraud—no concealment ; and, on the contrary, peculiarities were announced, and the purchaser was put fully on his guard. If the seller had not had the substantial right of property, the case might have been different ; but it was undoubted that there was such a right, and that there had only been a blunder in making up the titles. Besides, the only person who could possibly object was Denniston ; but he was barred from doing so by the act of his mother, whom he represented, and he was a party to the ranking and sale, and had stated no objections to Newtownrigg being sold.

The **LORD PRESIDENT** concurred with Lords Balgray and Gillies, and remarked that this was a judicial, not a private sale ; that the Court had required purchasers to satisfy themselves not only as to the validity of the titles, but also as to the right to the property ; and therefore they were put fully on their guard. It would, no doubt, be different, if the titles had referred to another estate from that which had been exposed to sale—to that of B. instead of A. But here the objection was, not that the estate was different from that which had been exposed to sale, but merely that a mid couple of the titles was wanting, which might be supplied.

*Pursuer's Authorities.*—(2.)—3. *Ersk.* 8. 94 ; *Buchan*, Dec. 7. 1796, (9822.)

*Defender's Authorities.*—(1.)—*Rowan*, Nov. 24. 1769, (14178) ; *Hay*, July 10. 1788, (14183) ; *Anderson*, Dec. 4. 1818.—(2.)—*Yule*, Feb. 10. 1758, (5299.)

**CAMPBELL** and **BURNSIDE**, W. S.—**W. GRIERSON**,—Agents.

**POLLOCK'S REPRESENTATIVES, Pursuers.**—*Murray*—*A. Wood*. No. 30.

**R. C. BUCHANAN**, Defender.—*Dean of F. Cranstoun*—*Greenshields*—*Moncreiff*.

*Society.*—THIS was a branch of the accounting mentioned ante, Vol. II. No. 650 ; and the point in dispute was, whether certain consignments of tobacco to Buchanan were to be considered as solely for Pollock's private behoof, or whether Buchanan was entitled to claim a share in the profits of them, as having been for the benefit of a company in which they were both partners.—The **LORD ORDINARY**, on advising a voluminous correspondence, found that Buchanan ' had no title nor right to participate in the

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'four adventures,' and sustained the claim of Pollock's representatives thereto. The Court adhered.

R. COWAN, W. S.—G. DUNLOP, W. S.—Agents.

No. 31.

J. REID, Pursuer.—*Dean of F. Cranston—Skene—  
J. Henderson jun.*

W. WILSON, Defender.—*Bell—H. J. Robertson—Watson.*

*Title to Pursue—Bankrupt.*—A bankrupt found entitled, after a discharge under a composition contract, to pursue an action of reduction and spuilzie, (which had been instituted by his trustee,) without any express assignation.

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1st DIVISION.  
Lord Meadow-  
bank.  
S.

IN December 1816, Wilson, as agent for the Caithness Bank, executed a poiding of the stocking and other effects belonging to Reid on the farm of Brims; and in August 1817 the estates of Reid were sequestrated under the Bankrupt Act. Soon thereafter, the trustee, alleging that the poiding had been illegal, and that Wilson had taken possession of the effects without any authority, and contrary to law, raised an action against him of reduction, count and reckoning, repetition and spuilzie. During its dependence, Reid made an offer of composition of 10s. per pound to his creditors; and although he did not stipulate for any assignation to the action against Wilson, yet, in his letter of offer, he called upon that person to account to him for his intromissions. This offer was afterwards accepted; and Wilson, who had claimed on the estate, gave his concurrence to it. After the composition had been approved of by the Court, Reid lodged a minute in the action of reduction, &c. praying for leave to sist himself as pursuer. This was objected to by Wilson, who contended, 1. That as Reid had no assignation from the trustee, he was not entitled to pursue;—and, 2. That it would be contrary to equity to permit him to insist in such an action, because the concurrence of Wilson to the composition had been given and received on the assumption that he was a creditor, and that if matters were not held to be thereby concluded, he would be deprived of his right to plead compensation to the extent of one half of his debt. To this it was answered, 1. That although an assignation might be necessary to entitle a bankrupt to set aside a preference acquired by a creditor, yet here the allegation was, not that Wilson had acquired a preference, but that he had carried away part of the effects, contrary to law, and had been guilty of a spuilzie; and that Reid was entitled to redress, without any assignation.—2. That it appeared from the whole circumstances relative to the composition, that it was understood that Reid was to have right

to pursue the action ;—and, 3. That although Wilson had claimed on the estate as a creditor, yet his right to do so had never been recognised ; and his concurrence to the composition was his own act, and was unnecessary. The Lord Ordinary ‘ repelled the objections to the title of John Reid to sist himself as a party in ‘ place of his trustee ;’ and the Court refused a petition without answers. And thereafter, on advising a petition, (which they appointed to be given in, both on the title and merits, in place of one in which the merits were not argued,) with answers, adhered.

The Court were of opinion that this case was altogether different from a reduction of a preference ;—that the allegation was, that the effects had been carried away contrary to law ;—and that, in such a case, the bankrupt had a title to insist for restitution without an assignation from the trustee.

*Defender's Authorities.*—(1.) 2 Bell, 486, and cases there.

J. JAMIESON,—W. DYMOCK, W. S.—Agents.

J. DAWSON, Suspender.—*Alison*.

G. CULLEN, &c. Chargers.—*Macnochie*.

No. 32.

*Pending.*—Whether competent, on a decree against one partner, to point the effects of the partnership.

CULLEN and others, workmen in a quarry which had been let to Dawson and M'Pherson jointly, and of which the latter had the management as overseer, raised an action for payment of wages against M'Pherson alone, before the Justices of Linlithgow, in which county the quarry was situated ; and having obtained decree against him, they proceeded to point the working implements in the quarry. On this, Dawson presented a bill of suspension and interdict, on the grounds, 1. That the instruments pointed were his sole property, M'Pherson having, as he alleged, renounced his share of the lease in his favour ;—and, 2. That even holding the tools to be joint property, it was incompetent to point them on a decree against one of the owners alone. The Lord Ordinary refused the bill, ‘ In respect that the complainer ‘ admits that he and James M'Pherson were originally partners ‘ in working Binny quarry, and that he has not shown any renunciation by M'Pherson of this concern, nor even distinctly ‘ specified when he alleges such renunciation took place : And ‘ further, that the debts claimed against M'Pherson arose out of ‘ the agreement by which the respondents were to work in the

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BHL-Chamber.  
Lord Medwyn.  
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‘quarry; and that, so late as 9th August last, the complainer admitted his liability for such agreements, and that the goods ‘pounded were effects used in working the said quarry.’ But the Court altered, and remitted to pass the bill, and grant the interdict.

W. N. GRANT,—J. DUNCAN, W. S.—Agents.

No. 33.

G. HUNTER, Petitioner.—*More.*

HON. B. COCHRANE, Respondent.—*Dean of F. Cranstoun.*

*Inhibition.*—Held that a defender, against whom an inhibition on a depending action was executed, was not entitled to insist on the pursuer accepting payment, and finding caution to repeat, with full interest.

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M’K.

COCHRANE having used inhibition on the dependence of the action of accounting between him and Hunter, mentioned ante, Vol. III. No. 51. the latter applied to have it recalled, offering to pay Cochrane whatever sum he should condescend on as the amount of his claims, provided Cochrane should become bound to repay ‘the whole, or such part thereof as may ultimately be ‘found not to be due, with the legal interest thereof.’ This was objected to on the part of Cochrane, as compelling him to pay five per cent. interest, in case his claims should fall short of his estimate of their amount; and the Court refused to recall the inhibition, except on caution or consignation at Hunter’s risk.

W. DICKSON, W. S.—J. THOMSON, W. S.—Agents.

No. 34.

J. ROBERTSON, Pursuer.—*Sol.-Gen. Hope—Rollo.*

R. ANNAN, Defender.—*Dean of F. Cranstoun—Cunninghame.*

*Bill of Exchange—Vitiation.*—A bill which was addressed originally to one of two acceptors ‘as cautioner,’ and which was altered to ‘conjunctly and severally,’ held vitiated.

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M’K.

ROBERTSON, as drawer of a bill for £100, dated in 1816, addressed to Annan and Glass, ‘conjunctly and severally,’ and accepted by them, raised an action against them in 1821 for the amount. In defence, Annan stated that he had accepted the bill blank in the drawer’s name, for the accommodation of Glass;—that it was originally addressed to him ‘as cautioner;’—that these words had since been erased, and the words ‘conjunctly and severally’ introduced;—and that Robertson was not an onerous bonâ fide holder. Robertson denied these allegations; but the circum-

stances being suspicious, the Lord Ordinary appointed all the parties, together with the writer of the bill, to be judicially examined. The history which Robertson gave, both in this declaration and in a subsequent condescendence, as to his acquisition of the bill, was very contradictory; but he admitted that he did not receive it till long after it was due. The person by whom the bill was written, declared that the words 'conjunctly and severally' were not in his handwriting; and that, to the best of his recollection, the words 'as cautioner' were those which had originally been written. Glass, on the other hand, stated that the bill had been in its present form from the first; but the vitiation was manifest *ex facie* of the bill. Robertson having contended, 1. That the alleged vitiation was not material, and, 2. That *malæ fides* and non-onerosity could only be proved by writ or oath, the Lord Ordinary repelled the defences, and decerned in terms of the libel; but the Court altered, and assoilzied.

**LORD GLENLEE.**—The vitiation is clear and obvious, and it is very material in so far as regards the defender. His claim of relief against his co-acceptor is cut off by it; and no man is at liberty to take a vitiated document, when the vitiation alters materially the situation of any of the parties to it. Besides, Robertson took the bill after it was five years past due; and this enters into the consideration of the question of *bona fides*, as it renders the holder much more liable to any objections pleadable against the original creditor.

**LORD PITMILLY.**—The vitiation is a sufficiently good defence; and the nature of the pursuer's statements, especially when they are contradictory of each other, would likewise be a sufficient bar to his action.

**LORD ALLOWAY.**—Either of the two grounds of defence would be sufficient. The vitiation is obvious; and the bill having been received by Robertson, when so long past due, allows all objections against the original holder to be pleadable now. On this point, and on all others regarding bills of exchange not affected by statute, the law of England and Scotland must be the same.

**LORD JUSTICE-CLERK** concurred.

*Pursuer's Authorities.*—(1.)—Gordon, June 23. 1737, (1447); M'Dougal, Feb. 13. 1810, (K. C.); Schutte, Feb. 18. 1822, (ante, Vol. II. No. 292.); *Marsden v. Pettit*; I. Campbell, 82.—(2.)—Gordon, June 23. 1784, (7532.)—(3.)—2. Bell, 261; Chisty, p. 129; *Russel v. Langstaff*, Douglas, p. 496; Smith, Feb. 27. 1824, (ante, II. No. 691.)

*Defender's Authorities.*—Murchie, July 1. 1796, (1456); Allan, March 5. 1800, Ap. No. 116. B. of Ex.

H. J. ROYLE, W. S.—T. CORBET,—Agents.

- No. 35. Miss MARY BROWN, Pursuer.—*Moncreiff—Christison.*  
 TRUSTEES of the late JOHN BROWN, Defendants.—*Cockburn—*  
*Mailland.*

*Res Judicata.*—Judgment having been pronounced by an American Court, finding the fee of certain sums to belong to the pursuer under a settlement of her late brother, executed in America, decree was pronounced conformably in her favour.

May 27. 1825.

2<sup>d</sup> DIVISION.

Lord Eldon.

M.K.

Miss BROWN brought a reduction of two deeds of settlement executed by her father and mother, in so far as they bequeathed in favour of the late John Brown certain sums left to her by her brother William Brown, who had died resident in America. The case depended in a great measure on the question, whether, by the law of America, the fee of the money in dispute had vested in Miss Brown, or in her parents, whose settlements were challenged; and as it appeared that there was a decision of an American Court, in certain proceedings with William Brown's executors, ordaining them to pay to her the share attempted to be bequeathed by her parents as belonging to them, the Lord Ordinary and the Court reduced in terms of the libel, disregarding certain acts of homologation on the pursuer's part, as having arisen from facility and imposition.

W. FERGUSSON, W. S.—Æ. M'DEAF, W. S.—Agents.

- No. 36. A. WHITSON and Others, Petitioners.—*Dean of F. Cranston—*  
*A. Murray.*

Mrs. ANN SPEID and Husband, Respondents.—*Jeffrey—*  
*Cuninghame.*

*Parent and Child—Title to Person—Nobile Officium.*—Habl. 1. That trustees and tutors appointed by the father of two natural children, (to whom he had bequeathed his fortune,) were entitled to apply to have one of them, who had attained nearly eleven years of age, removed from the custody of the mother;—and, 2. That the Court had power to remove the child to a more advantageous situation for education.

May 28. 1825.

2<sup>d</sup> DIVISION.

B.

THE late Dr. Hunter left two illegitimate daughters, Ann and Elizabeth, by his housekeeper Ann Speid. He conveyed, by a trust-deed of settlement, his whole property to Whitson and others, as trustees, with directions to divide the free residue (amounting to about £8000) equally between these two children, whom he stated that he wished 'to be brought up, clothed, and educated in a respectable manner;' and he also appointed them to be tutors and curators to the children, 'for the purpose

'of managing the funds.' Shortly after Dr. Hunter's death, Ann Speid married one Nicol, a spirit-dealer in the Canongate of Edinburgh; and the trustees placed Ann, the eldest daughter, at the boarding-school of Mrs. Morison in Perth, in the neighbourhood of which most of Dr. Hunter's relations and the trustees resided. Being desirous of placing Elizabeth along with her sister, the trustees, in 1820, applied to the Court for authority to do so; but she being then only six years of age, the Court dismissed their petition 'in hoc statu.' Elizabeth being now nearly eleven years of age, they presented a second petition, praying to have her removed from the custody of her mother, and placed in a proper situation for conducting her education, in a manner conformable to the station of life which her fortune might enable her to attain, the means of which she could not possess while residing with the mother and her husband, (to whose respectability, however, in his rank of life, they made no objections); and, in support of this application, they contended that the mother's marriage was of itself sufficient to deprive her of any right of custody, even supposing that the mother of a natural child possessed in law any such right, which they denied. The application was resisted by the mother, on the grounds that the trustees had no title to make it; and that, as her husband had retired from trade, and resided in a respectable way in the suburbs, the proper education of her daughter would be sufficiently ensured without removing her from their house. The Court, however, 'sustained the right and interest of the petitioners to make the present application to the Court;—and in respect the said Elizabeth Hunter has now attained the age of nearly eleven years, and from the whole circumstances of this case, they find that it is expedient to remove the child from her present situation, in order that she may be placed in the mean time in the house of Mrs. William Morison in Perth, where her sister was formerly placed, and there educated under the directions of the petitioners; and for that purpose ordained the said Elizabeth Hunter to be immediately removed, and placed in the house of Mrs. Morison accordingly.'

**LORD GLENELG.**—The petitioners have no right *de jure* to claim the custody of the child; but they are appointed by the trust-deed to disburse the funds left to their charge, according to Dr. Hunter's instructions, and they cannot fulfil these instructions without the interference of the Court. They are therefore entitled to bring the matter before the Court, leaving it to them to exercise their

jurisdiction in regulating the mode of education fittest for the child. It is very doubtful whether the mother of a bastard child, even when she remains unmarried, has any legal claim of custody. It is rather because it is generally best for the child, that it is allowed to remain with her ; and it was for this reason, that in the former case between the parties, the Court left the child with her mother, notwithstanding her marriage. No such reason now exists ; and all claim of right, if any did exist, is at an end by the marriage ; so that the only question is, What is best for the child ? While she was an infant, she ran no risk with her mother ; but now that she is coming of age, and is possessed of money, it may perhaps go to support the mother's husband and family ; and she ought further to be educated, so as to give her a better chance of establishment in the world, than she can have, if she remain in her present situation.

**LORD ROBERTSON.**—There can be no difficulty as to the merits of the case. The girl, if properly educated, may get into superior society. Mere teaching of accomplishments does not amount to proper education. Habits of thinking, and tones of feeling, are of much more importance ; and, without throwing any reflection on the character of the respondents, the circumstance of the mother's having had natural children must exclude her from proper society ;—and if the child remains with her, she must be alienated from her sister, whose education and habits will be totally different. On the matter of title, his Lordship entertained the same opinion with Lord Glenlee.

The other Judges concurred ; and it was stated by the Lord Justice-Clerk, that it appeared from his notes of the opinions at the advising of the former case, that the principal ground of decision was the age of the child, which rendered it most for her advantage to remain with her mother. His Lordship also observed, that even then, though the child was under seven, the Court might have removed her, had the character of the mother been bad.

*Petitioners' Authorities.*—3. Ersk. 10. 8 ; Johnston, Nov. 23. 1785, (16374) ; Noble, July 14. 1627, (407) ; Gordon, Feb. 23. 1632, (16250) ; M'Dwaine, July 31. 1736, (16340.)

*Respondents' Authorities.*—Wilson, March 10. 1819, (F. C.) ; Burgess, March 4. 1758, (1857) ; Short, Feb. 21. 1765, (442) ; Whitson, &c. Dec. 2. 1820. (F. C.)

**THOMSON and FERGUSON, W. S.—T. DABLING, W. S.—Agents.**



G. MILNE, Claimant.—*Dean of F. Cranstoun—A. Bell—Keay.* No. 37.  
D. M'LEAN, W. S. Respondent.—*Sol.-Gen. Hope—W. Bell.*

*Law Agent.*—A law agent found personally liable for his client's share of the expense of a report of an accountant ordered by the Lord Ordinary, and that he could not relieve himself by intimating to the accountant that he would not be responsible.

IN 1821, Mr. M'Lean, as agent for Gray, raised an action of count and reckoning, at Gray's instance, against Mackie and Company. On the 22d January 1822, the Lord Ordinary 'remitted' to Mr. Milne, accountant in Edinburgh, with instructions to 'him to examine all the accounts between the parties since the 'commencement of their transactions in 1803, and to report quam 'primum.' The process was accordingly laid before Mr. Milne by Mr. M'Lean in March thereafter, and he immediately proceeded to examine the accounts of the parties; and various communications took place between him and the respective agents. In January 1823, Mr. M'Lean requested Mr. Milne to write such a letter as he could transmit to his client Gray, relative to the expense of the report. This having been done, Mr. M'Lean sent it to Gray, along with a letter from himself, stating, 'that as the 'expense of such an investigation by an accountant must be very 'considerable, and as I am determined neither to incur outlay nor 'responsibility of that kind, I should recommend, that, if possible, you should come here yourself, see the accountant, and 'satisfy him in some way or another, either by impressing money 'in his hands, or satisfying him of ultimate payment, so that no 'responsibility as to the expense of the report may attach to me.' Gray, accordingly, in February 1823, waited on Mr. Milne, and paid to him £5; and Mr. M'Lean alleged, that on that occasion his clerk certiorated Mr. Milne that he declined all future responsibility. Mr. Milne, however, proceeded as formerly, making occasional communications to the agents; and, in April thereafter, notified to Mr. M'Lean that he held him liable for Gray's share of the expense of the report. Mr. M'Lean immediately answered, 'I beg that you may understand that I am 'not to be personally responsible for any part of the expense of 'your report. I wrote to this effect to Mr. Gray, and recommended to him to come to town, so as to arrange with you in 'regard to this expense; and my clerk informed me that he had 'actually done so. I am considerably in advance for Mr. Gray; 'and although I have the best opinion of his case, yet I will 'on no account incur any further responsibility; but I have no

May 21. 1825.

1st Division.  
Lord Meadowbank.  
8.

'doubt he will impress any sum you consider necessary in your  
 'hands; and if you name it, I will instantly write him. I believe  
 'him to be an honourable, good man.' Mr. Milne took no notice  
 of this letter, and six months thereafter communicated the draft  
 of his report to the agents, and thereafter lodged it in process.  
 Having claimed payment from Mr. M'Lean of the share of the  
 expense due by Gray, this was resisted, on the ground, 1. That  
 an accountant had no claim against the agent in the cause, but  
 only against the party; and, 2. That, at all events, he could not  
 be liable for any expense which was incurred, subsequent to the  
 period of declining to be responsible. To this it was answered,  
 1. That an accountant, to whom a remit has been made, is, *quoad*  
*hoc*, an officer of Court; and that an agent in a cause is as much  
 responsible to him for the expense of his report, as he is to the  
 other officers of Court for their respective dues; and, 2. That  
 there being this responsibility, the agent could not free himself  
 from it, merely by saying that he would not be responsible,  
 and that the only mode of doing so, was by ceasing to act as  
 agent in the cause. The Lord Ordinary at first assoilzied Mr.  
 M'Lean; but, on a representation, he decerned against him for  
 Gray's share of the report, deducting the £5 paid to account, in  
 respect 'it is established that the process Gray against Mackie  
 'and Company was, after the remit by the Lord Ordinary in the  
 'cause, laid before the representor (Mr. Milne) by the present  
 'respondent, as agent for Gray, in the month of March 1822; that  
 'it is not even alleged that any intimation was then made to the  
 'representor; that, in proceeding to make the necessary investiga-  
 'tion and report, he was not to rely for his expenses and remunera-  
 'tion upon the joint responsibility of the respondent and his client,  
 'according to the rule in such matters, now firmly established in  
 'the forms of this Court, but upon that of the latter alone; that,  
 'in such circumstances, the representor was entitled to rely for  
 'payment of one half of his expenses and remuneration, on the  
 'joint responsibility of the respondent; and accordingly, on such  
 'reliance, he actually made a considerable part of the investiga-  
 'tion required by the Lord Ordinary; that it was not for 18  
 'months thereafter, viz. 19th April 1823, that the respondent  
 'gave notice to the representor that he was not to be liable for  
 'the expense of the remit; and that such intimation would  
 'have no effect in relieving the respondent of the responsibility  
 'previously incurred, and on which the representor, notwithstand-  
 'ing thereof, was still entitled to rely.' To this interlocutor the  
 Court adhered.

**LORD HERMAND** thought that the interlocutor was right in every respect.

**LORD BALGRAY** observed, that the general rule as to the liability of the agent was undoubted; and that if Mr. M'Lean had wished to avoid it, he ought, when the remit was made, to have ceased to act as agent in the cause. If, before doing so, the accountant had made progress, he would have been liable; but if the accountant had not made progress, he was of opinion that Mr. M'Lean would not have been liable. But here he acted all along as agent.

**LORD CRAIGIE** thought there was no general responsibility attachable to the agent, and that the accountant must look to the party; but, at all events, Mr. M'Lean, in the special circumstances of this case, was not responsible.

**LORD GILLIES** observed, that an accountant, to whom a remit has been made, is an officer of Court, who, in general, knows nothing of the parties, and who is bound to execute the orders of Court.

The agent, however, knows his employer; and if he is not satisfied as to indemnification, he ought to cease to act as agent.

The **LORD PRESIDENT** was of the same opinion; and remarked; that every agent knows that he must lay out money for his client in conducting his cause; as, for example, the fees of clerks and of counsel; so also, if the assistance of persons of skill be required, such as engineers or inspectors, he must pay their fees; and it has never been the practice to require them to look to the parties, of whom they probably know nothing.

**M'KENZIE and SHARP,—D. M'LEAN, W. S.—Agents.**

**A. HOOD.—Brodie.**

**D. SMITH.—Pyper.**

Competing.

No. 38.

THIS was a question of expenses in a multiplepinding. The Lord Ordinary found them due to neither party; but the Court altered, and decreed against Smith.

**BURD, M'MILLAN, and MILLER, W. S.—G. HEGGIE, W. S.—Agents.**

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Lord Meadow-  
bank.  
S.

No. 39. DAVID MILLER, (JA. DUNCAN'S Trustee,) Pursuer.—*Moncreiff*  
—*M'Neil*.

PATRICK DUNCAN, Defender.—*Dean of F. Cranston*—*Robertson*.

*Assignment—Lease.*—Circumstances under which an assignment of a lease by a father to a son of 16 years of age was found effectual in a question with the creditors of the father.

May 31. 1825.

1st Division.

Lord Alloway.

8.

On the 25th of January 1773, the Earl of Panmure granted a lease of the farm of Balmossie to the late Patrick Greenhill, ' his heirs and assignees, but, in all events, secluding subtenants, cottars ' only excepted, and that for the full space of two 19 years certain, ' and upon expiry thereof, during the remaining life of the tenant ' then in possession,' James Duncan having married the daughter of Greenhill, the lease was assigned to him by the contract of marriage. In 1811, and when the period of the two 19 years was about to expire, James Duncan, who was then in his 75th year, became desirous to assign the lease to his eldest son Patrick, who was then 16 years of age, in order that he might enjoy the lease during his life. With this view, he consulted Mr. Ross, the late Dean of Faculty, as to the most effectual mode of doing so, and inquired whether it was possible to reserve to himself an interest in the lease. He was informed that it was necessary to make a true and complete assignment, and that he should transfer to his son the whole stocking on the farm, without which it could not be possessed, but for which he might stipulate a price. A few days after receiving this opinion, James Duncan granted to his son a formal assignment, on the narrative, ' that ' Patrick Duncan, my eldest lawful son, has granted me his acceptance, payable at Martinmas next, for the sum of £3950 ' sterling, being the agreed on price and value of the lease and ' stocking after assigned.' He then assigned the lease and stocking to his son absolutely. This assignment was immediately intimated to the landlord, and recognised by him; but the acceptance mentioned in the narrative was not granted. The name of James Duncan was taken off all the carts on the farm, and that of Patrick substituted in its place; and the rents, taxes, and public burdens, and sales of the produce of the farm, were paid and effected in his name. Patrick, however, was at this time an apprentice to a writer to the signet, and resided in Edinburgh, (with the exception of one or two months each year,) the farm being managed by his father; and it was alleged that the whole expenses

were disbursed by him. In 1820, and after Patrick had attained majority, James Duncan became bankrupt, and his estates were sequestrated. An action of declarator of trust, and of reduction of the assignation, was then brought by Miller the trustee, on the ground, 1. That the assignation was truly a mere trust for behoof of James Duncan, no value having been given for it, and Patrick not having been in a condition to pay the price, or to attend to the farm; and, 2. That as James Duncan continued his original possession, and was apparently the tenant, his creditors were entitled to attach the lease on the principle of reputed ownership. To this it was answered, 1. That the circumstances under which the assignation was granted proved that it was complete and absolute, and that it was made *bonâ fide*, at a time when James Duncan was solvent; and, 2. That from and after its date, Patrick Duncan had been held forth to the public as the sole tenant. The Lord Ordinary, after making a remit to an accountant, found the assignation effectual, and assolized Patrick Duncan, 'in respect that in 1811, when the assignation took place, James Duncan was not only not insolvent, but was universally believed to be opulent—in respect he was expressly informed by the opinion of eminent counsel whom he consulted, that unless the assignation was in every respect *bonâ fide* in favour of his son, it could not be effectual against the landlord, but that he was entitled to burden his son with such a sum as he considered the farm and stocking assigned to be worth—and in respect that this assignation was executed after receiving that opinion, and was immediately intimated to the landlord, in whose rental-books Patrick Duncan has since that period stood as the sole tenant, and the whole rents, taxes, and public burdens have been paid in his name; and his name, since the date of the assignation, had been inserted upon the carts and waggons upon the farm;—reserving to the pursuer, as the trustee for James Duncan's creditors, his claim against the defender for the sum of £3950 sterling, as being the price of the stock and lease so assigned to him by his father; and to the defender, his claims for extinction thereof, as accords.' His Lordship refused a representation, and adjourned this note: '1. Even supposing the whole conclusions of the representation were well founded, and that the defender could not be held as effectually and civilly in possession of the farm, it does not seem to be disputed, that at least 60 days before his father's bankruptcy the defender actually resided upon the farm, and was the sole possessor of the subjects

2. To as far as the question depends upon trust, that trust can

‘be qualified only by the writ or oath of the defender. 3. The case of Yeoman goes far beyond any of the views expressed by the Lord Ordinary, and the interlocutor was pronounced altogether independent of that case.’ The Court, on advising a petition and answers, adhered, and thereafter refused a petition without answers.

**LORD HERMAND** observed, that the assignation was formal and absolute, and had been duly intimated to the landlord, so that the father was completely divested; that the transaction was a fair and proper one for the benefit of the family, and that every means had been adopted to put the public on their guard.

**LORD BALGAY** thought the circumstances suspicious; but he could not see what benefit the creditors could derive from setting aside the assignation, because a large price was payable for it to which they would have right, and the endurance of the lease would be made to depend on a life of small value.

**LORD CRAIGIE** held that the assignation could not be binding on the landlord, unless expressly consented to by him, for he got a tenant who was unfit to manage the farm, and who possessed no capital to carry it on; and the assignation was not even binding on the assignee, who was a minor, and might set it aside within the quadrennium utile.

**LORD GILLIES** observed, that leases of this nature were formerly not uncommon, and that the landlord here, so far from being injured, was benefited, because he got a young active tenant, instead of an old man with the infirmities of age. The assignation was binding on the son, because he was thereby lucratus, and the transaction had been made in a fair manner, and for a proper object.

The **LORD PRESIDENT** concurred; and remarked that the provision in the lease appeared to be intended for the benefit of the family of the tenant in possession at the end of the second 19 years, by enabling him either to sell it to a stranger, or convey it to any of his children. It had been in this case fairly made, and had been intimated to the landlord, who recognised it, so that it was complete in every form. If the son had been a major, then the possession of the father might have given rise to a plea that the transaction was simulate; but he was a minor, who could not possess, who was at his education, and whose father, as his administrator-in-law, had the legal right of possession for his behoof. Besides, every precaution was taken to announce to the public the change which had been effected.

*Purser's Authority*.—1. Bell, 185. 186. 187.

*Defender's Authorities*.—Yeoman, Feb. 2. 1813; Bell on Leases, 348. Note A.

D. M'LEAN, W. S.—ROBERTSON and GORDON, W. S.—Agents.

J. VANS AGNEW, Petitioner.—*Jeffrey—Pyper.*

No. 40.

J. BELL, W. S. Respondent.—*A. Bell.*

*Inhibition and Arrestment.*—Held (but reversed) that legal diligence on a dependence cannot be recalled without caution, on account of alleged uncertainty of success, or on account of counter claims.

THE respondent, as trust-assignee of the purchasers of the Barnbarroch estates, having raised an action against Agnew for the ameliorations mentioned ante, Vol. III. No. 171. which he estimated at nearly £10,000, executed inhibition and arrestment of the rents of his estates on the dependence. Agnew thereupon presented a petition to the Court, praying for the recall of these diligences without caution, on the grounds, that the claim was ill founded and uncertain, and that he had counter claims in dependence against the purchasers to a much larger amount. The Court refused this prayer, but recalled the diligences, on caution to the extent of £6000.\*

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2d DIVISION.  
B.

The Court were unanimously of opinion, that it was impossible to recall legal diligence on the supposed uncertainty of the justice of the claims of the party using it; and that this was completely different from the case of Mrs. Fullerton, whose claims were contingent, and would only emerge in the event of her success in another action.

*Petitioner's Authority.*—Hamilton v. Mrs. Fullerton, March 4. 1823, (ante, Vol. II. No. 241. 242.)

J. B. GRACIE, W. S.—J. BELL, W. S.—Agents.

J. M'GREGOR, Advocate.—*A. M'Neill.*

No. 41.

P. MITCHELL, Respondent.—*Morr.*

*Apprentice.*—THE question here was, Whether M'Gregor was entitled to insist on the services of a person who had come under indentures to him as an apprentice, after he was certiorated that

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Lord Mac-  
kenzie.  
M'K.

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\* Agnew having appealed as to the condition of caution, the judgment of the Court was reversed by the House of Lords on June 4. 1825, and the diligences ordered to be recalled without caution.

he had previously bound himself apprentice to another master, from whom he had deserted, but to whom he had returned? The Justices of Lanarkshire found that he had no right in a question with the first master; and, in an advocacy, the Lord Ordinary and the Court remitted simpliciter.

R. KENNEDY, W. S.—W. and A. G. ELLIS, W. S.—Agents.

No. 42.

JAMES MOWAT and COMPANY, Advocators.—*Buchanan.*

TAILORS OF ABERDEEN, Respondents.

*Corporation—Exclusive Privilege.*—Held, 1. That a seal of cause of one craft, which referred to and bestowed the exclusive privileges in the seal of cause of another craft, afforded a good title to the former; and, 2. That a member of the guild was not entitled to infringe the privileges of a craft of which he was not a member.

June 1. 1825.

1st Division.  
Lords Alloway  
and Eldin.  
D.

IN 1818, the Corporation of Tailors of Aberdeen raised an action for violation of their exclusive privilege of making and shaping clothes, before the Magistrates of that town, against John Stott, a journeyman tailor, who was employed by Mowat and Company, mercers and clothiers in Aberdeen, and who were burgesses and members of the guild, but had not entered with the corporation of tailors. After some proceedings, Mowat and Company were called as parties, and were assoilzied. The Corporation having brought an advocacy, Mowat and Company objected, that although the Corporation had a title to elect office-bearers and make bye-laws, yet they had no title to exclusive privileges. In support of their title, the Corporation produced a seal of cause from the Magistrates of Aberdeen, dated 9th June 1533, in these terms:—‘Item, The touun being convenit, as said is, grantit ye same privilegis to ye tailzours ya have grantit afor to ye smytis, and sicklik pouar; ya chesand p’ntand (presenting) to yame an sufficient dikin sicklik as the smytis hes done, yat sal answer to ye touun for ye haill craft, and dec’nis yame y comond seill yd upoun.’ The seal of cause granted to the smiths declared, ‘Secondly,’ ‘Yt na freman sall be maid of ye said craft qll he be examined be said decane and his successors,’ and found ‘wprdly, be his wark, to be ane maist and admittet be yame, and presentit to us, as ane abill pson, to be maid freman of ye said craft; and yat nane be sufferit to hald nor uptak buith nor forge of his awin qll he be freman, and admittet be us, and ye said decane, as said is.’ The Lord Ordinary found, ‘that the seal of cause, obtained by the tailors, from the Magistrates of Aberdeen, in the year 1533, necessa-



'nly imports the exclusive privilege of exercising their craft within burgh, as the same privileges are conferred upon them that are granted to the hammermen, in whose seal of cause an exclusive privilege, that none but freemen shall work at the craft, is conferred: That the only question betwixt the tailor craft and the Messrs. Mowat and Company is, whether they, as members of the guild of Aberdeen, are entitled to employ persons unfree of the tailor trade, to work for them in shaping or making within burgh: Finds, that being a member of the guild does not warrant an infringement of any of the privileges of the crafts, any more than a person, being a member of one craft, would be entitled to exercise another craft; and that, therefore, Mowat and Company are not entitled to employ persons as tailors who are not freemen of the incorporation of tailors.' To this interlocutor Lord Eldin adhered, and the Court refused a petition without answers.

J. J. FRASER, W. S.—J. MORISON, W. S.—Agents.

D. KENNEDY, Advocate.—*Jameson.*

No. 43.

T. TAYLOR, Respondent.—*D. Macfarlane.*

THE question here related to the conjoining of two actions in certain special circumstances. The Lord Ordinary conjoined them, and the Court refused a petition without answers.

June 1. 1825.

1st Division.  
Lord Eldin.

H.

GREIG and PEDDIE, W. S.—T. JOHNSTONE,—Agents.

Mrs. LOVE or BRODIE and HUSBAND, Pursuers.—*Brown.*

No. 44.

JOHN LOVE, Defender.—*Greenshields—Fletcher.*

*Submission.*—A submission having been made to five persons, with power to the majority to pronounce judgment in case of variance of opinion, and after various proceedings had taken place, two of the arbiters having resigned, found that a decree by the other three was effectual.

THE pursuer Mrs. Love, and the defender, were the only children of Robert Love and Jean Connel. The latter died in 1810, and her husband in 1813. Five years before his death, Robert Love executed in favour of the defender a disposition and deed of settlement of his property, heritable and moveable, subject to the burden of an heritable bond of provision of £300 in favour of the children of his daughter, payable at her decease,

June 1. 1825.

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Lords Mac-  
kenzie and  
Eldin.  
S.

and to be liferented by her at the rate of 4 per cent. per ann. This liferent right he declared should be in full satisfaction of all 'bairns' 'part of gear, portion natural and legitim, executry, and any other 'thing whatsoever, which she can ask, claim, or demand by or 'through my decease, or by and through the decease of her said 'mother.' Being dissatisfied with this provision, Mrs. Love and her husband raised two separate actions against the defender before the Sheriff of Ayrshire; in the one of which she claimed a share of her mother's executry, and in the other a share of the legitim due from the estate of her father. After some procedure, a new action was raised by them before the Court of Session, embracing both of these points; and the two actions depending in the Inferior Court were advocated ob contingentiam. These three actions were conjoined; and the Lord Ordinary remitted to an accountant 'to 'report upon the amount of the funds to which the pursuer's 'legitim may apply.' After a report by the accountant, the parties entered into a submission, by which they referred 'to 'the amicable decision, final sentence, and decree-arbitral, to 'be given and pronounced by Robert Dunlop, surgeon in Beith; 'James Clark of Burnfoot, Kilbarchin; Robert Houston of Mains-Hamilton; and William Kirkwood in Knockside, Largs, arbiters mutually appointed by the said parties; together with a 'fifth person to be chosen by said arbiters themselves, and whom 'they are hereby fully empowered to name to act as arbiter along 'with them; the conjoined actions and processes at present intended and depending before the Lords of Council and Session, 'at the instance of the said Margaret Love, and her said husband 'for his interest, against the said John Love, with the whole 'conclusions thereof, and defences thereto; which actions were 'called in Court in the year 1815, and sundry steps of procedure 'were since had, and several interlocutors pronounced therein by 'the Lord Alloway, Ordinary, and by the Lords, which have 'been followed by the report of an accountant; with power to the 'said five arbiters to name their own clerk, and award payment 'of his fees, and with power to hear parties on the matters submitted, and to take all manner of probation thereanent which 'to them shall appear necessary; and whatever the said arbiters, 'or, in case of variance in opinion, the majority of them, shall 'determine in the premises, in whole or in part, by any interim 'or final decret-arbitral to be pronounced by them betwixt and 'the day of next, or any future day they shall 'prorogate this submission, which they are hereby empowered to 'do as often as necessary, the parties submitters bind and oblige

‘themselves, their heirs and successors, to abide by, implement, and perform to one another.’—The four arbiters named by the parties accepted of the submission by a minute, and named Robert Speir of Camphill ‘as arbiter, to act along with us for determining the matters submitted, with the same powers as ourselves.’—The arbiters accordingly proceeded to execute their duty by taking parole evidence, and causing a valuation to be made of the heritable subjects. Dunlop and Kirkwood having, however, disagreed with the other three on various points, and alleging that they were acting unfairly, resigned their office, and protested against a prorogation of the submission which had been made, contrary to their consent, by the other arbiters. Notwithstanding this, the three remaining arbiters pronounced a decree arbitral, by which they assoilzied the defender from the ‘conjoined processes before specified, and whole conclusions thereof.’ Of this decree Mrs. Love and her husband brought a reduction, on the ground, 1. That the three arbiters had no power to pronounce judgment, because the submission was made to five persons jointly; and that although a majority was authorized to decide where there was a variance of opinion, yet this referred to a difference of opinion on the merits, and did not entitle them to proceed when the others had ceased to be arbiters; and, 2. That they had not decided all the claims which had been submitted. To this it was answered, 1. That all the arbiters had accepted,—that all the investigations had been made by them jointly,—that, in point of law, even where there was no provision for a quorum, the minority could not prevent the majority from pronouncing a decision,—and that, in this case, it was agreed that a majority should have power to pronounce judgment; and, 2. That the arbiters had decided the whole points in dispute, all of which were embraced in the conjoined actions, from which they had assoilzied the defender. Lord Mackenzie assoilzied the defender; but Lord Eldin recalled this interlocutor, and decreed in terms of the libel, in respect ‘that although the majority of the arbiters had power to determine in the premises in case of variance of opinion, the majority had no power to determine when there was no variance of opinion; or when the remaining arbiters were not made acquainted with the proceedings, or were not consulted by the majority; or declined to give their opinions, or declined to take any further concern in the submission: That legal remedies might have been applied in such a case, if the majority had refused to determine in the absence, and without the knowledge of the remaining arbiters: That the decreet-arbi-

‘trial was altogether erroneous, in so far as it did not dispose of the pursuer’s claim for her share of the goods in communion; and it does not appear that the claim was ever investigated.’ But the Court altered, and assoilzied the defender; and, on advising a petition with answers, adhered.

The Court held the decree to be formal, and that the regularity of it was supported by various authorities.

*Pursuers’ Authorities.*—(1.)—3. Ersk. 3. 84. 48; Dig. de Recept. lib. 17. § 7; Sutherland, June 5. 1695, (14719); 4. Ersk. 8. 30.

*Defender’s Authorities.*—Patersch, March 9. 1561, (654); Riddle, July 26. 1634, (14720); M’Muth, Jan. 10. 1624, (14719); Dunsmoor, July 30. 1745, (656.)

J. STEWART,—W. PATRICK, W. S.—Agents.

No. 45.

TRUSTEES of W. K. LAWRIE, Pursuers.—*Moncreiff*—*H. J. Robertson.*

J. DONALD and Others, Defenders.—*Dean of F. Cranstoun*—*A. Bell.*

*Repetition.*—A party in possession of two entailed estates, with different destinations, having sold a farm of one for redemption of the land-tax of both, and purchased it in fee-simple for his own behoof, his representatives found liable, on the sale being reduced, to repeat the rents of the farm, and entitled, on the other hand, to repayment from the heir of one of the estates of the redemption-money and expenses of the sale, offering to that estate.

June 1. 1825.  
2<sup>d</sup> DIVISION.  
Lord Glenlee.  
M’K.

THE late Mr. Sloan Lawrie succeeded to the estates of Redcastle and Bargattan, under two deeds of entail, which, in certain events, carried the estates to two different series of heirs. In 1799, in virtue of a process carried on in absence of any of the heirs of entail, he procured a warrant for selling the farm of Edgarton, part of the estate of Bargattan, for the redemption of the land-tax, not only of that estate, but of Redcastle also. The farm was bought, in trust for himself, by his agent, in whose favour he executed a disposition; and who, after Mr. Sloan Lawrie’s death, (which occurred a short time subsequent to this,) conveyed the property to his sisters, who were his representatives and general disponees. The late Mr. Kennedy Lawrie having succeeded as heir of entail to both estates, raised an action against Mr. Sloan Lawrie’s sisters (afterwards carried on against Donald and others as their representatives) for reduction of the sale of Edgarton, as fraudulent and collusive, and injurious to the entailed estate. In 1806, decree of reduction was pronounced, re-

serving to the defenders all claims of relief competent to them. An appeal was taken against this judgment, which was affirmed by the House of Lords in 1814; but the cause was, at the same time, remitted to this Court to consider certain objections taken to the title of the trustees of Mr. Kennedy Lawrie, who had died, leaving a trust-conveyance of the estate of Bargattan, in which he was last substitute heir of entail, while Redcastle descended to certain substitutes under the destination of the entail of that estate. After several years litigation, these objections were repelled, and decree of removal obtained. Claims of relief were then given in by the defenders, which consisted in a demand for repetition of the amount paid for the redemption of the land-tax of the two estates—of the remainder of the price of the farm of Edgarton, as expended in payment of the entailer's debts—and of the expenses of the process of sale, with interest of these several sums. On the other hand, the pursuers raised a supplementary summons, concluding not only for the rents of Edgarton actually received from the period of the sale till possession was ceded in 1819, but for the actual value of the lands, alleging that the rent had been kept down below the real value, on purpose to defraud them; but they failed to condescend on any facts from which this could relevantly be inferred. The Lord Ordinary having reported the case, the Court found the pursuers entitled to the rents of Edgarton, payable by the tenants from the death of Mr. Sloan Lawrie, with interest, to commence running three months after each term's rent fell due; and the defenders entitled to the price paid for the land-tax of Bargattan, and to the expense of the process of sale effecting thereto, with interest from Mr. Kennedy Lawrie's accession to the estate, and also to the interest of the price of the land-tax of Redcastle, and expenses effecting, during the years that that estate was possessed by him; and remitted to the Lord Ordinary to hear parties as to the claim for repayment of the entailer's debts, the interest of parties regarding which, their Lordships found to be nowise affected by the proceedings in the sale.

JAMES DUNLOP, W. S.—VANS HATHORN, W. S.—Agents.

No. 46.

J. DOBIE, Pursuer.—*Fletcher*.R. STEVENSON, Defender.—*Sandford—Neaves*.

June 2. 1825.  
1st Division.  
Lord Alloway.  
H.

*Reference to Oath.*—THIS was a question as to the import of an oath emitted by Stevenson on a reference by Dobie. The Lord Ordinary found it affirmative of the reference, and the Court adhered.

W. PATRICK, W. S.—J. T. MURRAY, W. S.—Agents.

No. 47.

R. M'FARQUHAR, Advocate.

G. M'KEDDIE, Respondent.—*Lumsden*.

June 2. 1825.  
1st Division.  
Bill-Chamber.  
Lord Gillies.  
D.

IN this case no general point was decided. The Sheriff of Ross-shire had pronounced a long and special judgment, by which he decerned against M'Farquhar in an action at the instance of M'Keddie; but the Lord Ordinary remitted to alter, and to assoilzie M'Farquhar; and the Court refused a petition without answers.

R. M'KENZIE, W. S.—L. M'LEWIS, Agents.

No. 48.

WILLIAM M'CANDLISH, Pursuer.—*Mare*.PETER FORBES, Defender.—*J. Henderson jun.*

*Judicial Examination.*—Circumstances in which a party was held not bound to disclose from what source he acquired a large sum of money.

June 2. 1825.  
1st Division.  
Lord Alloway.  
H.

THE late William Forbes had a daughter, Jane, who was married in 1814 to M'Candlish; another, Helen, who was unmarried; and a son, Peter, the defender. By the contract of marriage with M'Candlish, William Forbes disposed, from and after his decease, 'to and in favour of the said William M'Candlish and Miss Jane Forbes, in conjunct liferent, for their liferent use alienary, and to the children in fee, 'one just and equal third share along with Peter Forbes and Helen Forbes, the other children of the said William Forbes, who are to enjoy the remaining two third shares, of all lands and heritages presently belonging, or which shall belong to him, the said William Forbes, at the time of his death;' as also one equal third part of the moveables belonging to him at the time of his death. At this time William Forbes was said to have been worth £12,000. His son Peter held a com-

mission in the army till 1819, when he was put upon half pay; and he then came to reside with his father, and continued to do so till 1831, when he married, and took up his abode in a separate house. Soon thereafter, his father, who was engaged in no business, having become embarrassed, retired to the Sanctuary, but was afterwards relieved by Peter, who paid his debts. In April 1833, the father died insolvent; and M'Candlish (whose wife had died without issue) immediately instituted an action against Peter and Helen Forbes, alleging that his wife 'having died without leaving issue, the said William Forbes, with the intention of defeating the pursuer's claim for the liferent of one third of the heritable and moveable property of which he should die possessed, fraudulently conveyed and made over his whole property, during his lifetime, in favour of his surviving children, the said Peter Forbes and Helen Forbes;' and therefore concluded against them to account to him in terms of the marriage-contract. The allegation in the summons was denied; but Peter admitted that he had received in gift from his father two separate sums, one of £2000, and another of £449; and he stated that his father had reduced himself to insolvency in consequence of falling into extravagant and immoral habits.—The Lord Ordinary, after finding that the marriage-contract 'was an onerous obligation binding upon the said William Forbes, which he could not defeat by any gratuitous deed, granted in favour of the defenders or of other persons,' appointed parties to be heard upon these points, 1. Whether the defenders represent their said father, and are liable for his onerous deeds, in consequence of the provisions and donations which they received from him; 2. In what manner the parties propose that the funds left by the said William Forbes shall be ascertained, and what objections there are to a judicial examination of the parties with regard to these funds. Thereafter his Lordship appointed 'the defenders to appear and be judicially examined upon the points referred to in the above interlocutor.' Peter accordingly appeared and stated, that, on retiring from the army in 1819, he began to build houses in Edinburgh: That at this time he received £3000 from his father, and that he built houses in Newington, Hart-street, and Duncan-street: That these houses 'were erected when the declarant was living with his father before his marriage, and paid with the £2000 in part: That his father paid the whole expense of building the house at Newington: That the declarant himself paid the expense of building the Duncan-street house with part of the £2000 received from his father: That he also received

‘ £449 from his father, it being also part of the money already mentioned which the declarant paid for the ground at Hart-street, and the building thereon, so far as it was then advanced : That the remaining cost of building that house was paid by the declarant out of his own funds. Declares, that it amounted to £3000 : That that was the builder’s price. Interrogated, where the declarant got the £3000 to pay the builder ?’ This question he declined to answer as irrelevant, being advised to do so by his counsel. M’Candlish having required the judgment of the Lord Ordinary on this point, Forbes contended that he was not bound to answer it ; because, 1. He could not legally be compelled to explain in what manner he had acquired his funds ; that it did not follow that, because he had admitted the receipt of certain sums from his father, he had also received from him the £3000 ; that he might have obtained them in a lawful manner, or he might have realized them by gambling transactions, or by such other means as he did not choose to disclose ; and it was impossible for any Court of law to oblige him to give any such explanation ; and, 2. Because it was incumbent on M’Candlish, as pursuer of the action, if he alleged that the £3000 was part of the late Mr. Forbes’ estate, to prove his averment.—To this it was answered, That it was true that, in the general case, a party could not be required to answer such a question ; but that there were here such strong grounds of suspicion, from the fact of the late Mr. Forbes having been in possession of £12,000 in 1814—from having been subsequently in no business—from his son having resided with him in the mean while, (who could not allege that he had any property of his own)—and from the funds of his father having entirely disappeared, that the Court were entitled to make use of this means of ascertaining the truth. The Lord Ordinary allowed the question to be put ; observing in a note, that, ‘ after the late decision of the Court in the case of Moffat, in which the Court altered Lord Gillies’ interlocutor, the Lord Ordinary does not conceive himself entitled to disallow the question proposed. The answer can infer no infamy ; and if large funds of the defunct have disappeared, and if a person inter familiam had in the mean time erected a house which cost, by his own account, £3000, the answer may lead to the discovery of the persons in whose hands the father had placed the money.’ But the Court altered, and sustained the objection. :

The LORDS PRESIDENT and GILLIES thought that the case of Moffat had been erroneously decided, and that the question was incompetent. LORD CRAIGIE held that the judicial examination ought not to have



been allowed; and therefore would not sanction the question being put.

**LORD BALGRAY**, after expressing some doubt, agreed with the other Judges.

**LORD HERMAN** dissented.

*Pursuer's Authorities*.—Jantson, Feb. 8. 1814, (F. C.); Moffat, June 26. 1818, (not rep.)

*Defender's Authority*.—Gordon, Dec. 22. 1809.

**J. W. MACKENZIE, W. S.—J. GILLOX,—Agents.**

**J. GAVIN and Others, Pursuers.—Moncreiff—More—Brownlee.** No. 49.  
**TRINITY-HOUSE of LEITH, and TRADES of CANONGATE, De-**  
**fenders.—Sol.-Gen. Hope—Greenshields—Jeffrey—Alison.**

THIS was a special case, relative to the respective rights of the parties in the church of North Leith. An interlocutor had been pronounced by the Court in 1812, for the purpose of regulating them; but Gavin and others, heritors of the parish, alleging that it was ultra petita, brought an action containing declaratory, and reductive conclusions, to the effect either of having it explained or set aside. The Lord Ordinary assoilzied the defenders; and the Court, after being equally divided, and calling in the Lord Ordinary, adhered.

**COUPER and HUNT, W. S.—R. COWAN, W. S.—LOCKHART and SWAN, W. S.—Agents.**

June 2. 1825.

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Lord Meadowbank.  
S.

**THOMAS BOWHILL, Advocate.—Forsyth—Murray—D. Mac-** No. 50.  
**farlane.**  
**SHERIFF-DEPUTE of BERWICKSHIRE, Respondent.—Sol.-Gen.**  
**Hope—Dundas.**

*Messenger*.—Held that a messenger cannot be a procurator before a Sheriff Court.

IN 1813, the Sheriff-depute of Berwickshire made a regulation, by which 'it is hereby ordained, that from and after this date, no person shall be admitted a procurator before this Court who is at the same time a messenger at arms; and any procurator who, after this date, shall become a messenger, shall, by so doing, forfeit his right as a practitioner before the Court.' In 1824, Bowhill, who was a messenger at arms at Eyemouth, presented a petition to the Sheriff, accompanied with testimonials both as to character and qualifications, which were unexceptionable, praying to be put upon trials, and on being found qualified, to admit him as a practitioner before the Sheriff Court. The Sheriff, after ap-

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Lord Craigie.  
H.

pointing him to state whether or not he meant to resign the office of messenger, and he having answered in the negative, 'refused the prayer of the petition; reserving to the petitioner to renew the application made by him, if he shall resign the office of a messenger at arms.' Bowhill then presented a bill of advocacy, contending, 1. That the Sheriff had no power to make a regulation so as to exclude any one, who was legally qualified, from the office of procurator before the Court; and, 2. That there was no such incompatibility between the offices of a messenger and a procurator as to create a legal disqualification. To this it was answered by the Sheriff, That it was his duty to see that proper persons acted as practitioners before his Court, and that he was entitled to make regulations accordingly; that the inexpediency of allowing messengers to act as agents had been so much felt, that a similar regulation prevailed in twenty-one sheriffdoms out of twenty-four, and that the Court had repeatedly expressed their opinion that the junction of two such offices was attended with injurious consequences. The Court, on the report of the Lord Ordinary, refused the bill.

**LORD HERMAND** was of opinion, that the Sheriff was bound to adhere to the regulation which had been made; and that, so long as it remained unrecalled, the petition of Bowhill could not be listened to. The general question, however, as to whether a messenger could be a procurator was here presented, purely because there was no objection to the conduct or qualifications of Bowhill; but it appeared to him that the offices were incompatible, because a messenger might be obliged at one time to execute the diligence which on another he was employed as agent to oppose; and that there were so many temptations to violate law, and be guilty of oppression, that it was highly inexpedient that they should be united.

**LORD CRAIGIE** was of the same opinion.

**LORD GILLIES** took a different view of the case, and held that there were no legal grounds for excluding Bowhill; that it was a general principle of constitutional law, that every man was entitled to aspire to any office for which he was duly qualified, and that here the qualification was not denied; and although it was, no doubt, possible to show that, in certain situations, a messenger, who is also a procurator, might be exposed to temptations to do wrong, yet if he gave way to them, he would be liable to punishment. He also thought that the Sheriff had no power to make a regulation of the nature complained of; that it was impossible to point out a greater inexpediency between the two offices in question than might be figured between any other two civil offices; that practitioners before Courts

were daily admitted notaries-public, and that messengers were also allowed the same office, and yet they might happen to be called on to perform duties which were inconsistent with each other.

LORD BALGRAY was of opinion, that the regulation of the Sheriff could not prevent the Court from granting Bowhill's prayer, if they thought it proper; but the two offices appeared to him so inconsistent, that he could not sanction their union.

The LORD PRESIDENT observed, that it did not belong to the Court to deal out exclusive privileges; but there were certain cases in which they were called on, both by the law and by expediency, to interfere. For example, they would not permit any individual to hold the two offices of counsel and agent; and that, accordingly, when a counsel retired from the bar, and became an agent, he resigned his office; and when an agent came to the bar, he ceased to act in that capacity. He thought that there were equally as strong reasons for keeping the office of messenger and procurator separate; and that such appeared to be the general opinion of the country, from the regulations which were made in the various Sheriff Courts. These regulations, however, could certainly not prevent the Court from considering the question; and they could only be appealed to, as indicating what was the common understanding in the country, and as removing any plea of hardship.

CAMPBELL and BURNSIDE, W. S.—A. ROLLAND, W. S.—Agents.

A. B. Suspender.—*Moncreiff*—*H. Bruce*.

No. 51.

DIRECTORS OF AYR ACADEMY, Chargers.—*Dean of F. Cranston*  
—*Fergusson*—*Jameson*.

*Schoolmaster*.—The Directors of an Academy found entitled to dismiss the rector on cause shown.

By a royal charter establishing the Ayr Academy, the Directors are authorized 'to elect proper teachers for the various branches of education to be taught in the academy, under such conditions as may seem expedient;—to appoint salaries to said teachers from the funds of the academy;—to elect others in their place after their decease or removal;—to form regulations for both teachers and students;—and, in general, to regulate and govern the academy in every respect.' And they were also empowered to make bye-laws, 'providing always that they shall in no ways be contrary or in opposition to the laws of the kingdom, and the tenor of this charter.' In virtue of these powers, and to avoid litigation, and also to prevent the rector being re-

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Bill-Chamber.  
Lord Balgray.

moved at the caprice of those who might be the Directors, it was resolved on the 1st of November 1799, (at which time a rector was about to be elected,) 'that the rector now to be engaged should, in the contract with him, be declared to be removable upon a charge against him entered in the minutes, and signed by any two directors, and afterwards transmitted by the secretary in a circular letter to each director; and at a general meeting called for the purpose, at the distance of not less than one calendar month from the circulation of these letters, found by a majority of directors to be substantiated, and to infer such misconduct or crime, as in their opinion, rendered him unfit to remain at the head of the academy, the rector so dismissed being nevertheless entitled to his salary for the current term.' 'As also, that the rector should be bound to abide by such decision as pronounced in either of the cases specified, and that the judgment of the directors should be held to be final, and to be subject to no appeal, or revision, or alteration by any Court of law whatsoever.' A rector was accordingly chosen under these conditions,—A. B. having been an unsuccessful competitor. On the resignation, however, of this rector in 1809, A. B. was again a candidate; and it was entered in the minutes, that 'it having been put to the vote who should be the rector of the institution, under the terms and conditions specified in the fourth paragraph of the minutes of the 1st November 1799? it was carried unanimously that A. B. shall be rector to the institution. This election being intimated, and him called in, he accepted, and hereby accepts of the office of rector, under said conditions.' This, however, was not subscribed by him.

In 1824 A. B. became insolvent, and, in the course of an investigation into his affairs, certain circumstances were discovered affecting his moral character, which induced the Directors of the academy to hold a meeting, with a view to take the matter into consideration. It was accordingly unanimously agreed that the following charges should be served upon him, in terms of the resolution of the 1st November 1799:—'1. With having lent his name, and been accessory to an illegal and fraudulent transaction in the concealment of funds which belonged to the late James M'Harg of Ayr, in order to defraud the creditors of the said James M'Harg. 2. With having been guilty of a breach of trust in selling Government stock, held by him in trust for the said James M'Harg, and applying the proceeds to his own use, without the authority or knowledge of the said James M'Harg. 3. With having deceived the family of the said James M'Harg

‘after his death, and led them to believe, contrary to the truth, that the said stock remained unsold; and, 4. With having obtained money on false pretences from various persons, at times when he was well aware he was in bankrupt circumstances.’ To these charges he gave in answers; but the Directors being of opinion that they were not explained, and that they remained in full force, dismissed him from the office. He then presented a bill of suspension and interdict, on the ground, 1. That he was not bound by the conditions of the resolution of 1st November 1799, because he had not subscribed the minutes relative to his election. 2. That, as his literary qualifications and diligence in teaching were unimpeached, the Directors had no right to inquire into his moral conduct; and, 3. That, supposing they had such a right, the charges were unfounded. To this it was answered, 1. That it was not necessary that he should have signed the minutes, because they were the record of the proceedings of the Directors; and he could not deny the fact that he had been elected under these conditions, and therefore that the bill of suspension was incompetent.—2. That one of the essential requisites of a teacher, and particularly of one who is at the head of an establishment for the education of youth, was, that he should be of a good moral character; and that, if that were tainted, his literary qualifications were of little importance;—and, 3. That the Directors had shown sufficient evidence of the three first charges to entitle them to dismiss him. The Court, on the report of the Lord Ordinary, and on advising memorials, refused the bill.

LORD HERMAND considered this as a case of great importance;—that one of the first duties of a teacher was to educate his pupils in moral and religious principles;—and that it was essential that he himself should be a man possessed of these principles. From the evidence which had been adduced, however, he was satisfied that sufficient had been brought home to the suspender to justify the Directors in removing him, and that their proceedings had been in every respect regular and proper. He also thought that he was bound by the conditions of the resolution of the 1st November 1799; but that it was unnecessary to enter upon that, as sufficient cause for dismissal had been shown.

The other Judges concurred in this opinion.

*Suspender's Authorities.*—Magistrates of Montrose, Jan. 17. 1710, (13120); Hastie, June 27. 1769, (13132); Kemp, 1699, (13136); Adams, 1815, (not rep.)

J. GEMMELL.—DONALDSON and RAMSAY, W. S.—Agents.

## No. 52.

JOHN JARDINE, Pursuer.

J. JARDINE JUN. and Others, Defenders.—*Ja. M'Donald.*

June 3. 1825.

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Lord Meadowbank.  
S.

THE question here was, whether, in the special circumstances, an action of count and reckoning should be sent to an accountant? The Lord Ordinary remitted before answer, and the Court refused a petition.

J. VALENTINE,—C. MACDONALD, W. S.—Agents.

## No. 53.

A. M'CALLUM, Pursuer.—*Moncreiff—Fullerton—Fletcher.*WM. ROBERTSON, Defender.—*Ivory.**Submission.—A decree-arbital signed by two of three arbiters held good.*

June 3. 1825.

1ST DIVISION.  
Lord Eldon.  
H.

M'CALLUM and Robertson were partners, with certain other persons, of the company of Robertsons and Oughterson. M'Callum's share, it was admitted on both sides, was one-eleventh till May 1815, and that of Robertson three-elevenths. In that year, however, Robertson alleged that he had conveyed one of his shares to M'Callum, so that each of them now held two-elevenths. The company having suffered a considerable loss in the year ending May 1816, a dispute arose between Robertson and M'Callum as to the extent of their respective shares. By M'Callum it was averred that he held only one-eleventh, while Robertson stated that he held two-elevenths; and that he was liable in a corresponding share of the loss. This on each eleventh share was £904:16:10; of which, in the balance struck on the 7th of May 1816, only one share was charged against M'Callum, while three were put to the debit of Robertson. A submission was then entered into by them, 'to James Leitch and Duncan Ferguson, merchants in Greenock, and Alexander Campbell, Sheriff-substitute of Paisley, arbiters mutually chosen by the said parties, and in case of their differing in opinion, to any two of them—all claims, disputes, and demands subsisting between the said parties, respecting the proportions of profit and loss arising out of the transactions of Robertsons and Oughterson, merchants in Greenock, for the year ending in May 1816, which they ought respectively to have borne, and which ought to have been carried to their respective debits and credits in the books of that company; with power to the said arbiters to ascertain whether or not there was any error, and if any, to what extent, committed in the statement of the ac-

'counts of the said parties, carried into the balance struck upon  
 'the books of the said company upon the 7th day of May 1816,'  
 &c. After making various investigations, a decree-arbitral was  
 pronounced, narrating, that 'the said arbiters having ultimately  
 'met and consulted together respecting the award which ought to  
 'be given, the said Duncan Ferguson declared himself to be of a  
 'different opinion from that which the other arbiters had formed  
 'upon the merits of the question at issue: Therefore, in virtue  
 'of the powers by the said submission committed to any two of  
 'the arbiters, in the event of a difference of opinion taking place,  
 'and being well and ripely advised, and having God and a good  
 'conscience before our eyes, we, the said James Leitch and  
 'Alexander Campbell, two and a majority of the said arbiters,  
 'do now give forth and pronounce our final sentence and decreet-  
 'arbitral as follows: viz. We find the said William Robertson  
 'entitled to receive from the said Alexander M'Callum the sum  
 'of £904: 16: 10 sterling, which sum we decern,' &c. This de-  
 cree was signed only by Leitch and Campbell, and by this finding  
 they held that M'Callum had two-eleventh shares, and therefore  
 that he was bound to relieve Robertson to the extent of one share.  
 Of this decree M'Callum brought a suspension and reduction, on  
 the ground, 1. That it was pronounced by two of the arbiters only,  
 without any evidence but that of their own statement that there  
 had been a difference of opinion, which alone could confer on  
 the two who should agree, the power to determine the points in  
 dispute; and, 2. That, although they had decided one of these  
 points, yet they had not made those investigations which were  
 necessary to ascertain whether the balance was correct, and had  
 pronounced no decision on that part of the case. To this it was  
 answered, 1. That there was sufficient evidence of the difference of  
 opinion, and that as the decree was signed by a majority of the ar-  
 biters, it was effectual; and, 2. That the arbiters had decided the  
 only point in dispute between the parties. Lords Kinnedder and  
 Mackenzie successively repelled the reasons of suspension and re-  
 duction; but Lord Eldin, on advising a condescence with an-  
 swers, found 'that the decreet-arbitral in question was not author-  
 'ized by the submission;' and therefore suspended the letters, and  
 decerned in the reduction. The Court, however, found 'that  
 'the decreet-arbitral in question, having been signed by the two  
 'arbiters, was valid and effectual in point of form;' and therefore  
 altered, and assoilzied in the reduction, and found the letters  
 orderly proceeded; and thereafter refused a petition without  
 answers.

LORD BALGRAY was of opinion, that the only difficulty in the case was, whether the decree exhausted the submission, because he held that it had been correctly pronounced in point of form: From the evidence, however, and particularly from the judicial admissions of M'Callum, he was satisfied that the arbiters had decided the only point which was submitted to them.

LORD CRAIGIE thought there was not sufficient evidence of the difference of opinion which was required, before the two arbiters were authorized to pronounce judgment; and, on that ground, the decree was objectionable.

The other Judges, however, agreed with Lord Balgray, and held that the decree was perfectly formal.

*Defender's Authorities.*—Dig. de Recept. c. 17; Reg. Maj. 2. 5; 1426, c. 87; 1. Bank. 23. 9; Gordon, Nov. 30. 1716, (655); Middleton, June 9. 1721, (Reb. Ap. Ca. 581); Gardiner, Jan. 19. 1773, (659); A. S. Dec. 17. 1783.

W. DOUGLAS, W. S.—MACMILLAN and GRANT, W. S.—Agents.

## No. 54.

J. MURDOCH, Pursuer.—*Fergusson*.

J. and W. CURRIE, Défenders.—*Cunningham—Craigie*.

*Process—Fee-Fund.*—A representation lodged within the reclaiming days found competent, although not marked by the collector of the fee-fund.

June 3. 1825.  
2d DIVISION.  
Lord Cringletie.  
B.

J. and W. CURRIE having been called as defenders in an action at the instance of Murdoch, obtained the benefit of the poor's roll for two years, which expired in February 1823. They did not apply for a renewal of it, but continued to enjoy the privilege. The Lord Ordinary having decerned against them in November 1824, they put in a representation, with a condescendence, on the last of the reclaiming days; but neither of them was marked by the collector of the fee-fund. The representation was afterwards objected to as incompetent on that account, and the Lord Ordinary sustained the objection. Thereafter Curries obtained a renewal of the benefit of the poor's roll; and, on a petition, the Court altered, and remitted to receive the representation.

LOKDS FITMILLY, ALLOWAY, and JUSTICE-CLERK held, that although Curries were in the situation of other litigants, and the renewal of the privilege did not affect the question, yet the enactment of the 50. Geo. III. c. 112. did not render the representation incompetent, but only exposed the clerk to complaint for receiving it without being fee-funded.



LORD ROBERTSON thought that the clerk had no power to receive the representation, and therefore that it was incompetent.

*Pursuer's Authorities.*—50. Geo. III. c. 112. § 20; Nicholson, Nov. 5. 1815, (F. C.)  
*Defender's Authorities.*—Jeffrey, March 2. 1820, (F. C.); M'Whirter, Feb. 14. 1822,  
 (ante, Vol. I. No. 360); M'Donald, June 12. 1823, (ante, Vol. II. No. 370. note.)

J. GEMMELL,—J. PEDDIE Jun., W. S.—Agents.

W. DYKES and MANDATORY, Pursuers.—*Skene—Walker.*

No. 55.

W. WATSON and Others, Defenders.—*Bell—Robertson.*

*Guarantee—Process.*—1.—A letter of guarantee held not to cover transactions prior to its delivery;—and,—2.—A party not allowed, at the last stage of the cause, to found on additional transactions not formerly libelled on.

WATSON and others granted to Harvey of Limerick in Ireland a letter of guarantee, dated July 4. 1818, to the extent of the sums affixed to their respective names, 'as a collateral security to William Dykes, Esq. of Dublin, or to any other person you may pass your indorsations to, the said securities to be binding on us for nine months from this date.' On the 16th July thereafter, Harvey indorsed this letter to Dykes in these terms: 'Please hold this as a security for any bills you may discount for me.' In August 1818 Harvey became insolvent, and on the 5th March following he granted to Dykes a draft on Watson &c. for £255, as the balance arising on the bill transactions between them as at the date of his insolvency. Payment of this having been refused by Watson &c., Dykes raised an action against them under the letter of guarantee, on the ground that this draft fell under the guarantee, or at least that the amount of it formed the balance of the bill transactions with Harvey on the faith of the guarantee. At the earliest stage of the cause, Dykes produced an account-current alluded to in the summons, and bringing out the balance concluded for; but it appeared from this account that the balance in his favour had arisen prior to the indorsement of the letter of guarantee, and that, on the transactions subsequent to that period, there was a balance in favour of Harvey. Watson &c. therefore pleaded in defence, 1. That Harvey's draft was not an indorsement, to which alone the guarantee extended, and was nothing more than a declaration of Harvey's, while bankrupt, as to the amount of the balance against him; and, 2. That no transactions prior to the indorsement of the guarantee to Dykes could be held to be covered by it. The Lord Ordinary decerned

June 3. 1823.

2d Division.

Lord Cringletie.  
 F.

against Watson &c., but afterwards reported the case on memorials, when the Court altered his Lordship's interlocutor, and assolizied them; and their Lordships subsequently refused to allow Dykes to instruct a balance in his favour, arising on bills alleged by him to have been discounted subsequent to the indorsation of the guarantee, but not mentioned in the account given in by him at the commencement of the action.

J. MACKENZIE,—J. and W. FERRIER, W. S.—Agents.

No. 56.

SUSAN RALSTON, Pursuer.—*Campbell*.  
W. EATON, Defender.—*Fergusson—Maitland*.

June 4, 1825.

1st DIVISION.  
Lord Meadowbank.  
H.

THIS was a question as to which of the parties should pay for the report of an accountant. The Lord Ordinary appointed it to be paid in the mean while by Eaton, who, the accountant had found, was owing a balance as one of the curators of Ralston. The Court adhered.

J. KENNEDY, W. S.—JAMES GEMMELL,—Agents.

No. 57.

M'VEY and BUCHANAN, Suspenders.—*Neaves*.  
J. SAWERS, Charger.—*Shaw*.

*Process—Bill-Chamber—A. S. 14th June 1799.*—A petition incompetent after the issuing of a certificate of refusal of a bill of suspension, and after execution done by applying the judgment in the Inferior Court.

June 4, 1825.

2d DIVISION.  
Bill-Chamber.  
Lord Robertson.  
B.

TWO horses having been put into Sawers' stables by order of the Sheriff of Stirlingshire, to be kept by him during a dispute between M'Vey and Buchanan and another party, relative to the right to them, he (after the lapse of three months) applied to the Sheriff for a warrant to sell them in payment of their keep. The Sheriff found M'Vey and Buchanan entitled to delivery of them on paying this expense, and granted warrant of sale in the event of their failure to take delivery on that condition, of which proof was to be produced prior to the sale. M'Vey and Buchanan, having declined to take them on this condition, presented a bill of suspension and interdict, which was refused by the Lord Ordinary. This being in time of vacation, a second bill was presented, which was also refused, and a certificate of refusal was obtained, and produced in the Inferior Court, where a note was lodged by M'Vey and Buchanan, craving to be heard against any renewal of

the warrant, and on which certain interlocutory orders were pronounced by the Sheriff. On the meeting of the Court, a petition was presented by them against the interlocutor refusing their bill of suspension. Sawers then objected, 1. That the bill of suspension was incompetent, because it was presented against a decree before extract; and, 2. That the petition was incompetent, because the certificate of refusal had been issued, and execution had taken place, by the judgment having been acted on in the Inferior Court. The Court refused the petition as incompetent.

Their Lordships were agreed that the legal steps taken in the Inferior Court, after the issuing of the certificate, were a sufficient execution, so as to bar presenting the petition; but they seemed to consider that it was competent to complain by suspension of such incidental orders as that of the Sheriff in this case, and which were intended to be carried into immediate execution.

D. HORNE, W. S.—A. BAYNE,—Agents.

D. CHRISTIE, Suspender.—*Jameson*—A. Wood.

W. P. and J. WILSON, Chargers.—*Jeffrey*—A. M'Neil.

No. 58.

*Process—Suspension—Urban Tenement.*—1.—A summary order by an inferior Judge may be complained of by suspension during the dependence of the cause.—2.—Dean of Guild may summarily ordain a party to rebuild a breach in a house made without authority.

CHRISTIE having, without the authority of the Dean of Guild, commenced taking down his house situated in the Drygate of Glasgow, whereby an opening of considerable extent was made through the mutual gable between his house and the wall of the neighbouring tenement belonging to Wilsons, they applied to the Dean of Guild for an interdict and damages, and to have Christie ordained to build up the gable as it formerly stood. After some procedure, and leading a proof as to the state of the gable, which appeared to be in a decaying condition, the Dean of Guild ordained Christie to repair the gable, and, on his failure to do so, authorized Wilsons to execute the repairs at his expense. Christie having refused access to the workmen, the Dean of Guild granted warrant for forcing open the door of a shed which had been erected by Christie round his premises, preparatory to his intended operations. Christie thereupon presented a bill of suspension and interdict, which was refused by the Lord Ordinary, 'in respect that, 'by the interlocutor of 5th August 1824, the question of damages and expenses is reserved, and that this question has not

June 4. 1825.

2d DIVISION.  
Bill-Chamber.  
Lord Medwyn.  
M'K.

'yet been disposed of, and that no final judgment has been pronounced by the Inferior Court.' The Court, while they recalled this interlocutor, remitted to the Lord Ordinary to refuse the bill, with expenses.

The Court held that a suspension and interdict was a competent mode of complaining of a warrant of the nature of that granted by the Dean of Guild, although the cause was not final; but, on the merits, their Lordships (with the exception of Lord Alloway) were of opinion, that as Christie had commenced his operations without authority, the order of the Dean of Guild was right.

*Suspender's Authority.*—Hunter, March 10. 1824, (ante, Vol. III. No. 726.)

*Chargers' Authority.*—Dunlop and Andrew, Nov. 12. 1824, (ante, Vol. III. No. 196.)

J. M'DONNELL, W. S.—C. FISHER,—Agents.

No. 59.

J. LESLIE, Suspenders.—*Cunninghame—Robertson.*

W. FRASER, Charger.—*Sol.-Gen. Hope—A. McNeill.*

June 7. 1825.

1st Division.  
Admiralty.  
D.

IN this case no general point was decided,—the question being, whether a balance was owing by Leslie to Fraser? The Judge-Admiral, on the report of an accountant, decerned against Leslie, and the Court refused a bill of suspension.

D. SCALES,—T. LANDALE,—Agents.

No. 60.

JAMES CHARLES, Petitioner.—*More.*

J. ROXBURGH, Respondent.—*Baird.*

*Sequestration—Bankrupt—Process.*—(1.)—Circumstances in which an interim factor not allowed to retain the sequestered effects till repaid his advances;—(2.)—A petition against the interlocutor of a Lord Ordinary on the Bills of the Second Division to the first irregular, although the process of sequestration is in the latter Court.

June 7. 1825.

1st Division.  
Bill-Chamber.  
Lord Robertson.  
D.

THE estates of the Glasgow New Tanwork Company were sequestrated on their own application, with concurrence of Charles, one of their creditors. Before the election of an interim factor, Charles, in order to avoid a sale of part of the estate for payment of Excise duties, advanced the amount, being £297. Thereafter a competition took place between him and Howe for the office of interim factor, and they arranged to discharge the duties jointly. A contest also took place between Charles, Roxburgh, and Howe for the trusteeship, and a remit was made to the Sheriff to report. Roxburgh then presented a petition to Lord Robertson,

Ordinary on the Bills during vacation, praying to devolve the management of the estate upon the Sheriff of the county. This was resisted by Charles, on the ground that he was entitled to repayment of his advances, before the estate could be taken out of his hands. The Lord Ordinary having granted the prayer, Charles reclaimed to the First Division, where the process of sequestration was. The Court, however, being of opinion that they could not review the interlocutor of an Ordinary of the Second Division without a remit from that Division, remitted the petition thither; and thereafter, on the petition being remitted to them by the Second Division, they adhered.

G. COMBE, W. S.—W. and A. G. ELLIS, W. S.—Agents.

CHAS. FRASER, Pursuer.—*Dean of F. Cranston—Cunninghame.*  
THOMAS ALEXANDER FRASER, Defender.—*Gordon.*

No. 61.

*Entail*.—An obligation by an heir of entail, in leases of the estate, to pay for meliorations, found not binding on a subsequent heir of entail, the meliorations not having been made in terms of the 10. Geo. III. c. 51.

IN 1774 General Fraser executed a strict entail of the estate of Lovat, and, inter alia, provided 'that it shall not be in the power of any of the heirs succeeding to let tacks or rentals of the same, or any part thereof, for a longer space than 19 years, or for the lifetime of the granter; or to let any tack or rental with a diminution of the rental, unless the same be let without collusion by way of public roup to the highest bidder, by reason a tenant cannot be found at the time who will give the former rent, and that without grassum or other benefit whatever to the granter.' General Fraser, being embarrassed with debt, in 1779 conveyed his estates to trustees, to take effect after his death, with a view to the liquidation of them, and in the same year he addressed to one of them the following letter: 'As you seem to think written authority necessary, I hereby empower you, in my name, to promise to the tenants over all my estates meliorations for houses and buildings that may be made and erected by them, not exceeding three years rent of the respective farms, to be paid at their removal by the incoming tenant; and I oblige me, and my heirs and successors, to implement such promise.' This letter was recorded in the Burgh Court-books of Inverness as a probative writ. In 1782 General Fraser died, on which the trustees immediately took possession; and in 1785 they made a general set of the farms for 19 years. By the leases,

June 7. 1825.

1st Division.  
Lord Alloway.  
S.

and particularly by that granted to the pursuer's ancestor, it was agreed that the tenant &c. should, 'at the termination of this tack, 'and upon their removal from the said lands, be entitled to receive from the heritor or incoming tenant the value of such 'houses and buildings as shall then be upon the foresaid lands, to 'the extent of £127. 10s. sterling money, being three years rent 'or tack-duties of the said possessions, provided the value of said 'meliorations shall amount to so much, over and above the sum 'of £5 : 15 : 6 sterling,' &c. The trust was terminated by an act of Parliament, under which authority was given to sell part of the estates for payment of General Fraser's debts; and in 1802 his brother Archibald Fraser made up titles as heir of entail, and took possession. He then entered into a transaction with the tenants, by which they agreed, on condition of receiving new leases for 19 years, to renounce their tacks, and to defer any demand for payment of meliorations till the expiration of the new leases; and he, on the other hand, bound himself and his heirs to pay these and other meliorations to a limited extent. In 1816, Mr. Fraser, the granter of these leases, died; and the defender then succeeded to the estate as heir of entail. The leases having expired in 1821, the pursuer, as the representative of one of the tenants, brought an action against the defender for payment of the meliorations which had been made, both under the original and the new lease. In defence it was pleaded, 1. That Archibald Fraser had no power to burden the subsequent heirs of entail with payment of the meliorations due under the original lease, and which were payable during the period of his possession;—2. That the defender did not represent him, and succeeded as heir of entail; and therefore, as the other meliorations had not been constituted in terms of the statute, they could not be claimed from him. To this it was answered, 1. That the stipulation as to meliorations was introduced under the authority of the entailer himself, and was binding on those who succeeded to the estate;—2. That the tenants were, by the custom of that part of the country where the estate was situated, entitled to payment of their meliorations;—and, 3. That the defender had derived advantage from them, by the rents and the value of the subjects being increased. The Lord Ordinary at first found that the claim was good, in respect of the letter written by the entailer, which formed a regulation in the management of the estate, and was, as such, notorious in that part of the country; but thereafter, on advising a representation, (and the pursuer having declined to call the heirs of Archibald Fraser, the granter of the new leases,)

his Lordship associated the defender, 'In respect that the late Archibald Fraser was in possession of the entailed estate of Lovat at the expiry of the leases granted by General Fraser, the entailer : That the meliorations exigible under those leases were due by him as the representative of the entailer, and likewise as being the heir of entail in possession : That these meliorations were payable by the heir of entail in possession ; and that Archibald Fraser, as heir of entail, had it not in his power to postpone and transfer this obligation, which was exigible from himself, upon any future heir of entail : That although these clauses as to meliorations to the extent of three years rents were effectual against the heir in possession,—seeing they were obligations imposed by the entailer in the leases granted by him,—yet this did not authorize the heir possessing the estate to introduce similar clauses, so as to affect heirs of entail who did not represent the granter of the leases ; and that such heir had no way of burdening the next heir of entail with meliorations in buildings to the extent of three years rent, except by following out the terms of the statute 10. Geo. III. with regard to improvements upon entailed estates.' To this interlocutor the Court adhered.

The Lord Ordinary, on advising a representation for the pursuer, which he refused, issued this note :—1. The amount of the original meliorations, contracted under the first leases, having been warranted by General Fraser, the entailer, or by his trustees, was an unquestionable debt due by his heirs or representatives.—2. Upon the expiry of these leases, the pursuer had an unquestionable claim upon the heir of entail then in possession, who could not take the estate without being liable for the whole of the entailer's debts and obligations, and of course payment of these meliorations.—3. The question then is, Whether the heir in possession could not only postpone and transfer this debt, then become due and exigible by the tenant at the end of his lease, upon an heir who had not then succeeded, but could then also create new obligations to affect that heir, to the amount of three years rent of the farms upon which these meliorations should take place, without having power, under the entail, to burden either the estate or the next heir with a debt to that amount, or without his having availed himself of the means which the statute 10. Geo. III. had afforded him of rendering three-fourths of these improvements a burden upon the entailed estate?—4. The Lord Ordinary concludes, upon the principle of the cases *Dillon against Campbell of Blythwood*, and *Webster against Farquhar*, and other cases of the same nature, that the heir of entail in possession had no

'power to subject the succeeding heir in the payment of these buildings.—5. With regard to the original meliorations under the first lease, although all the representatives of the entail are liable for the meliorations, yet the heir of entail who was in possession when that obligation became due and exigible, and his representatives, are liable in the first instance, and could not transfer and postpone this obligation upon the defender, the succeeding heir of entail. It is not disputed that the heir of entail then in possession, and his representatives, left sufficient funds for the payment of all those meliorations; and the Lord Ordinary therefore doubts how far that heir, by a connivance with the tenant having the right to those meliorations, could postpone the payment thereof until the expiry of the next nineteen years lease.—6. As to homologation, it is not alleged that any of those buildings for which the meliorations are claimed, were erected since the defender's succession to the entailed estates; and therefore there is not such a homologation arising from his drawing the rents for some of the last years of the lease, as could transmit this obligation upon him.'

In this opinion the Court concurred.

*Pursuer's Authorities.*—Arbuthnot, Feb. 5. 1772, (10424); Morison, Feb. 3. 1787, (10425.)

*Defender's Authorities.*—Sandford on Entails, 210; 3. Stair, 5. 18; 2. Ersk. 8. 51; 2. Bank. 5. 66; Dillon, Jan. 14. 1780, (15433); Webster, Dec. 7. 1791, (15439); (Bell's Cases, 207); Taylor, Nov. 1791, (Bell, 215); Campbell, Feb. 29. 1812, (F. C.); Todd, Jan. 14. 1823, (ante, Vol. II. No. 110.)

Æ..M<sup>r</sup>BEAN, W. S.—MORISON and BURNETT, W. S.—Agents.

No. 62.

J. MAY, Advocate.—J. W. Dickson.  
W. MALCOLM, Respondent.—Shaw.

*Arrestment—Execution—Expenses.*—Held, 1. That a warrant to arrest from the Magistrates of Glasgow, with concurrence of the Water Bailie, is sufficient to arrest a vessel on the Clyde, and within their jurisdiction. 2. That it is competent to receive an amended execution of arrestment, which is not inconsistent with the fact, and where there is no competition; and, 3. That an arrestment on a dependence covers the expenses of process, although decree be taken in name of the agent.

June 7. 1825.

2d DIVISION.  
Lord Mackenzie.  
B.

MALCOLM having raised an action against Campbell, for payment of £34, before the Magistrates of Glasgow, obtained from them a precept of arrestment on the dependence, in virtue of which, after the concurrence of the Water Bailie of the Clyde had been granted and indorsed on it, a vessel belonging in part to Campbell, and then lying at the Broonielaw of Glasgow, was arrested. It was not denied that the arrestment had been pro-



perly executed by the messenger, and that the schedule affixed to the vessel was correct and regular. Before, however, any execution had been returned, May offered himself as cautioner for loosing the arrestment, and he accordingly subscribed a bond, narrating that the vessel had been arrested in virtue of the precept from the Magistrates, on the dependence of an action before them, with the concurrence of the Water Bailie; and on this the arrestment was loosed. In the action at Malcolm's instance, the Magistrates assolizied Campbell; but, in an advocacy, the Court decerned against him, and found Malcolm entitled to expenses, for which decree was issued in the name of the agent. Campbell having by this time become insolvent, and gone to America, May, along with Ewing, the other part-owner of the vessel, and Campbell's attorney in this country, applied to the Water Bailie for a warrant to sell the vessel, and consign the proceeds in Court. Authority having been granted, the vessel was sold, and the price consigned. Thereafter an action was instituted before the Water Bailie at the instance of Malcolm, and of the agent in whose name decree for the expenses had been taken, concluding to have the vessel made forthcoming, or alternatively for payment of the principal sum and expenses awarded against Campbell; but the libel was afterwards amended, to the effect of allowing Malcolm alone to pursue for the whole sum. In the execution of arrestment returned by the messenger, and produced in the forthcoming, instead of stating the arrestment to have proceeded on a depending 'action before the Magistrates of Glasgow, and concurrence from the Bailie of the river &c. of Clyde,' the words, 'before the Magistrates of Glasgow, and concurrence,' were omitted; but, on a corrected execution being lodged, the Water Bailie, 'in respect there is no competition in this case among arresting creditors, or between arresting and other creditors,' allowed a proof in support of the corrected execution. On that having been adduced, he sustained it, and repelled an objection to the competency of the arrestment, and appointed May to condescend on how he proposed 'to implement his cautionary obligation to make the vessel forthcoming.' Having failed to obey this order, the Water Bailie decerned against him for payment, in terms of the alternative conclusion of the libel. May thereupon brought an advocacy, on the grounds, 1. That the warrant to arrest was inept, because it proceeded from the Magistrates, who had no jurisdiction over the vessel; and as it was not competent for one inferior Judge to grant his concurrence in the execution of civil diligence, that of the Water Bailie was

unavailing. 2. That the first execution could not support the action of forthcoming; and that the amended one was incompetent and inadmissible. 3. That the arrestment could not cover the expenses of the depending action; and besides, that as decree had been taken for them in the name of the agent, action for payment of them could not be sustained at the instance of Malcolm, who, by the amended summons, was the sole pursuer; and, 4. That the price of the vessel arrested being consigned in Court, there was no room for a personal decerniture against him. In answer, it was pleaded generally, that whatever weight might be due to the objections to the arrestment in a competition with creditors, May was barred from availing himself of them, having granted his bond of caution before the execution was returned, and having in his bond admitted that a perfectly correct and legal diligence had taken place. And in regard to the particular grounds of advocacy, it was answered, 1. That the arrestment was, in fact, used within the jurisdiction of the Magistrates, as the Admiralty jurisdiction on the Clyde belongs to the Magistrates of Glasgow, in virtue of royal charters, and the Water Bailie is merely one of the Magistrates to whom the exercise of this jurisdiction is confided; and besides, that the practice of the Water Bailie, in granting his concurrence to the execution of diligence proceeding on the warrants of Inferior Courts, had been sanctioned by constant usage. 2. That the execution objected to was not radically defective, there being only the omission of a few words in narrating the warrant, in virtue of which, it was admitted, the diligence had been executed; and that, even in competitions, corrected executions were admissible, where they contained nothing contradictory of the prior one. 3. That the expenses of the depending action were covered by arrestment, and that the decree, though taken in the agent's name as a matter of convenience, was truly for the client's behoof; and, 4. That the price of the vessel was not consigned in the process of forthcoming, but in another action; and that the personal decree was a necessary consequence of May's failure to implement the order of the Water Bailie to lodge a minute as to the mode of implementing his obligation. The Lord Ordinary, after ordering certificates as to the practice of Admirals Depute granting their concurrence to the diligence of Inferior Courts, remitted simpliciter, and the Court adhered.

**LORD GLENLEE.**—The points of chief importance are those as to the execution and the expenses, for which decree was taken in

the agent's name. In regard to the objection to the execution, it is of consequence that there is no competition in the case,—the only parties before the Court being the common debtor and the cautioner; and the way in which the bond of caution was granted, seems to preclude the cautioner from using the plea. He offered sufficient caution, and his bond narrates a sufficient arrestment; and the creditor, after that, might never think of getting an execution returned. Supposing the messenger had died, the cautioner could not have pleaded that there was no execution, (especially after getting possession of the vessel and selling her); although, if the question was with other arresting creditors, the case might be different. As to the expenses, it is a settled point, that those of the depending action (but not those of the forthcoming) are covered by the arrestment; but the decree here being in the agent's name creates, at first sight, a difficulty. This, however, does not make the agent the true creditor; it is merely a convenient practice to enable him to recover easily. The decree is not in his favour, but is only allowed to be issued in his name; and it would be going a great deal too far to prevent the arrester, on this account, from recovering his expenses out of the subject arrested, especially when the agent does not interfere.

**LORD PITMILLY** entirely concurred, and further observed, in regard to the competency of the arrestment:—The Magistrates of Glasgow are Admirals of the Clyde; and in virtue of that, as well as of the practice, it is perfectly regular in the Water Bailie to grant his concurrence to the precept of the Magistrates.

**LOKDS JUSTICE CLERK** and **ALLOWAY** were of the same opinion, and thought that, even in a competition, the amended execution might have been received.

*Advocator's Authorities.*—(1.)—3. Ersk. 6. 3; 2. Bell, 71; Forbes, Jan. 21. 1710, (676.)—(2.)—Thit, p. 17; Bell, 67. note 1; Hog, June 2. 1797, (F. C.)—(3.)—Wallace, July 1733, (8147); Dickie, Feb. 15. 1744, (772); Bell, p. 81.

*Respondent's Authorities.*—(1.)—Greig, March 5. 1752, (7518); Magistrates of Paisley, Nov. 30. 1790, (7687.)—(2.)—Forbes, July 20. 1768, (8805); Earl of Seafield, Feb. 28. 1709, (3806); Clark, July 17. 1732, (8806); Earl of Argyll, Jan. 25. 1667, (8837); Inglis v. Hadoways, Dec. 19. 1676, (8829); Jenkinson, Feb. 26. 1709, (8843); Begg, July 7. 1744, (8345); A. v. B. July 15. 1748, (8845.)—(3.)—3. Ersk. 6. 8; Wardrop, Feb. 1744, (1025); Wight, May 22. 1822, (ante, Vol. I. No. 482); M'Donald and Halket, Feb. 2. 1825, (ante, Vol. III. No. 345.)

R. WELSH,—C. FISHER,—Agents.

No. 63.

W. KILPATRICK and T. REID, Suspenders.

R. MILLER, Charger.—*Spies.*

*Bankrupt.*—Whether a creditor acceding to an informal and unsubscribed offer of composition be bound by it.

June 9. 1825.

1st Division.

Bill-Chamber.

Lord Medwyn.

D.

KILPATRICK and REID, having become insolvent, offered to pay a composition to their creditors by two sets of bills,—the one without, and the other with caution; the cautioners to ‘grant an obligation agreeing to be security on the terms above mentioned, providing the whole creditors agree to the offer within two weeks of this date.’ This offer was expressed in a minute of a meeting of the creditors, but was not subscribed by Reid and Kilpatrick. Deans, as the holder of a bill accepted by Reid and Kilpatrick, and drawn by one Dunlop, acceded to the composition, and required delivery of the composition bills. This was refused, on the ground that he was not an onerous holder, and that they had claims of compensation against Dunlop. Deans then assigned his bill to Miller, who gave Reid and Kilpatrick a charge for the whole sum. They presented a bill of suspension, on the grounds, 1. That they had a plea of compensation; and, 2. That they were not bound to pay more than the composition. To this latter plea it was answered, that as the offer of composition had not been subscribed by them, and as the conditions of it had not been complied with, it was not binding; and, therefore, the full debt was exigible. The Lord Ordinary passed the bill ‘on consignment of the composition due by the suspenders respectively on the bill charged on, or on caution to that extent, in the option of the charger, in respect the charger, who is the assignee of Deans the indorser, cannot urge any plea which he could not have maintained.’ And the Court refused a petition without answers.

*Charger's Authorities.*—2. Bell, 598; Johnston, Feb. 20. 1823, (ante, Vol. II. No. 204.)

GEORGE DUNLOP, W. S.—

—Agents.

J. YOUNG, W. S. Pursuer.—*Small Keir*.

No. 64.

J. COOPER, Defender.—*Shaw*.

*Husband and Wife—Agent and Client.*—An agent conducting lawsuits on behalf of a woman living separate from her husband, not entitled to demand from the husband payment of his business account in actions against the husband himself, when unsuccessful,—or in actions against third parties, whether successful or not.

MR. YOUNG, writer to the signet, raised an action against Cooper, for payment of a business account incurred by him, as agent for Cooper's wife, in certain processes carried on by her while living separate from her husband, and after an inhibition had been executed against her. The first was a suspension, at Cooper's instance, of a decree obtained by his wife for payment of an annuity stipulated by their contract of separation, which he refused to pay in consequence of the insulting manner in which she persisted in framing the receipts, and because he had revoked the contract. Two bills of suspension, presented by Cooper relative to this matter, were to a certain extent refused. The second was an action between Mrs. Cooper and her brother, in which Mrs. Cooper was successful, and the expenses of which, though not awarded in her favour, were reserved against her husband. The third related to a question between the husband and wife, in which the former was successful. The Lord Ordinary assailed Cooper, and stated in his notes, as the grounds of his decision generally, that an agent conducting processes for a wife living separate from her husband must look to his client alone for his expenses, and can only claim them from the husband in successful actions against himself;—and specially as to the first action,—that the right to expenses could only be tried in the suspension itself, which the agent was entitled to waken, in order to have that point determined;—as to the second,—that although Mrs. Cooper might have a claim for the expenses against her husband, yet, as she had not assigned that claim to Young, he could not sue for it in this action;—and as to the third,—that being an unsuccessful and ill-founded action, no claim could lie against Cooper, who was the defender in it. Young presented a petition against this judgment, which was at first refused, in respect it had not been marked by the clerk of Court, whereby the Lord Ordinary's interlocutor became final. Having been subsequently reponed by the Lord Ordinary, he presented a short petition, whereupon the Court resumed the former petition; on advising which, with answers, they adhered to the Lord Ordinary's interlocutor.

June 9. 1835.

2d DIVISION.  
Lord Cringletie.  
M'K.

LORD ALLOWAY alone differed from the Lord Ordinary's interlocutor. His Lordship held, that as the husband has the complete management of the wife's funds, he ought to pay the expense of any actions carried on by the wife, founded on reasonable grounds, whether successful or not.

*Purser's Authorities*.—M'Alister, Nov. 18. 1762, (4036); De la Motte, Feb. 9. 1769, (447); 1. Stair, 4. 17; 1. Ersk. 6. 26.

*Defender's Authority*.—Gordon, Dec. 13. 1776, (446.)

J. YOUNG, W. S.—J. DONALDSON,—Agents.

No. 65.

G. TOD, Advocate.—*Buchanan*—*M'Neil*.

MRS. DREGHORN'S REPRESENTATIVES, Respondents.—*Mors*.

*Process—Expenses*.—A petition against an interlocutor of the Lord Ordinary, and of the Inner House, on the point of expenses, in which nothing was said as to them, held incompetent.

June 9. 1825,

2d DIVISION,  
Lord Pitmilley.

F.

IN an action at the instance of the late Mrs. Dreghorn, before the Sheriff of Perthshire, against Tod her tenant, for non-implementation of certain obligations in his lease, the Sheriff decerned against him for a certain sum of damages, and found him liable in expenses. In an advocacy at Tod's instance, the Lord Ordinary pronounced an interlocutor remitting simpliciter, but which was silent as to expenses. On advising a petition with answers, the Court concurred in the Lord Ordinary's judgment; and a motion was made by Mrs. Dreghorn's counsel for expenses. The Court, however, being of opinion that none were due, simply adhered, without any finding as to expenses. Thereafter the representatives of Mrs. Dreghorn (she being now dead) gave in a reclaiming petition, praying to have expenses awarded, and contending, that as there was no finding on this point in the interlocutor of the Court, the petition was not contrary to the A. S. February 1. 1716. Their Lordships, however, refused it as incompetent.

The Court were unanimously of opinion, that although the petition might have been admissible, had the omission as to expenses been in consequence of the mistake of the clerk, it was quite incompetent as the case actually stood.

J. PEDIE, W. S.—A. BAYNE,—Agents.

J. WATLING, Suspender.—*Baird*.

No. 66.

Mrs. M'DOWALL, Charger.—*Shaw*.

*Nautæ Caupones, &c.*—1.—Whether the keeper of a lodging-house falls under the edict; and,—2.—Housebreaking held a vis major, so as to protect from liability for articles stolen.

WATLING, a clerk in Greenock, hired a room from Mrs. M'Dowall, in which he resided as a lodger for upwards of a twelve-month, at the rent of six shillings per week. An action having been brought against him for payment of a half year's rent before the Sheriff of Ayrshire, he pleaded in defence, that while he was residing in the house, part of his clothes had been stolen, for the value of which, he contended, that Mrs. M'Dowall was answerable, under the edict *nautæ caupones stabularii*. To this it was answered, 1. That as Watling had been a permanent lodger in the house, and had been received as such under a special contract, the edict did not apply, the object of it being to protect travellers, and to guard against the frauds of innkeepers, who were compellable to receive them; and, 2. That the clothes, along with others belonging to the family, had been stolen by a house-breaker, as was proved by the verdict of a jury; and that, accordingly, the housebreaker had been transported for life. The Sheriff-depute found that 'the edict *nautæ caupones stabularii* does not apply;' and, after decerning against Watling, he subjoined this note: 'This is a case of some importance and difficulty. The Sheriff is chiefly moved by the severity of the edict *nautæ caupones*, and the hardship of extending it to others who have not been considered generally as liable. The case in Fountainhall, alluded to by Erskine, as including the letters of lodgings, February 16. and July 5. 1694, *May v. Wingate*, is a case of circumstances, where there was a peculiar confidence reposed in depositing a sum of money, and negligence proved on the part of the defender. On the other branch of the cause, the *casus omissionis*, there is also some doubt; but were the pursuer otherwise liable, it is thought that she would have to prove a pretty strong case of masterful violence, and to show all due precaution on her own part, to escape liability.' The Lord Ordinary, in a suspension, found the letters orderly proceeded; and the Court refused a petition without answers.

June, 10. 1825.

1st Division.

Lord Eldon.

S.

The Court wished it to be distinctly understood, that they did not mean to decide the question whether or not the keepers of lodgings

fall under the edict; but that, in the circumstances of this case, the charge, even although she did fall under the edict, was not responsible.

*Suspender's Authorities.*—4. Dig. t. 9; 3. Ersk. 1. 29; May, Feb. 16. 1694, (9236); Tait's Justice of Peace, 285; 1. Bell, 875; 3. Ersk. 1. 28; 1. Bell, 3. 78.

A. SCOTT, W. S.—J. SMYTH, W. S.—Agents.

No. 67.

A. FYFE, Pursuer.—*D. Macfarlane.*

J. FERGUSON, Defender.—*Lumsden.*

June 10. 1825. THIS was a case of a special nature, relative to the liability of  
1st DIVISION. Ferguson for certain consignments which had been made to him.  
Lord Alloway. The Lord Ordinary in part assolizied him, and in part decerned  
H. against him. The Court adhered.

T. JOHNSTONE,—T. FERGUSON, W. S.—Agents.

No. 68.

SIBBALD'S TRUSTEES, Pursuers.—*Wilson.*

BABING, BROTHERS, and COMPANY, Defenders.—*Hyndman.*

June 11. 1825. THE sole point here related to a claim made by the defenders  
1st DIVISION. for expenses, after having been assolizied. The Lord Ordinary,  
Lords Alloway and Eldin. in the circumstances, found them due to neither party; and the  
H. Court adhered.

H. SIBBALD, W. S.—J. MOWERAY, W. S.—Agents.

No. 69. Rev. T. HYSLOP, Pursuer.—*Dean of F. Cranstoun—Fullerton*  
—*T. H. Miller.*

J. NAIRNE and Others, Defenders.—*Sol.-Gen. Hope—More.*

*Society.*—Held that the members of a religious association were not bound to pay the stipend of the minister whom they had called and appointed, longer than they adhered to the congregation.

June 14. 1825. ON the 4th of May 1815, the Associate Congregation of  
1st DIVISION. Burghers at Kirkaldy having resolved to appoint a minister to  
Lord Meadowbank. supply a vacancy, a meeting was held, at which it was 'agreed  
D. 'harmoniously to petition the Associate Presbytery at Perth and  
'Dunfermline, at their first meeting to be held at Milnathort, on  
'the 26th day of June next, for a moderation; agreed to give  
'£90 sterling of stipend annually, and £15 sterling annually for



‘house-rent ; and farther agreed to pay the taxes on his stipend, with sacramental expenses.’ A petition was accordingly presented to the Presbytery, in whose minutes it was stated, that they ‘entered on the petition lying on the table from Kirkaldy for moderation, and appeared as commissioners John Keldy and others : Read the petition again, with a minute of the congregation, signed by their preses, promising £90 sterling of stipend, with £15 sterling for the rent of a house, and to pay all taxes, with sacramental charges : Finding that the commissioners had no powers to satisfy the Presbytery that the stipend now offered would be increased as the congregation increased, it is hereby enjoined upon the member to moderate to receive satisfaction of the congregation in this matter before he proceed ; and unanimously granted the prayer of the petition.’ A meeting was in consequence held, at which ‘the managers of said congregation, after due deliberation, agreed that, as soon as their finances would permit, they would give some advance.’ A call was then made in these terms : ‘We, the under subscribers, the elders and members of the Associate Congregation of Kirkaldy, &c. being at present destitute of a fixed gospel ministry, and being well apprised by good information, and by our own experience, of the piety and prudence, literature, and other ministerial endowments of you, Mr. Thomas Hyslop, preacher, &c. do hereby invite, call, and entreat you, Mr. Thomas Hyslop, preacher, to come over and help us, by taking the charge and oversight of our souls in the Lord, and to discharge the duties of a faithful minister among us : And we do hereby promise you all due subjection, subsistence, and encouragement in the Lord.’ This deed, which was stamped and regularly tested, was subscribed by 106 members, and afterwards adhered to by nine others ; and having been approved of by the Presbytery, Hyslop was in consequence appointed minister. A dispute having afterwards occurred between him and several members of the congregation who had subscribed the call, they, in consequence, ceased to attend his church ; and having declined to pay his stipend, he brought an action against them, concluding for certain arrears, and also to have it declared, that, ‘so long as the pursuer shall remain in the charge and ministry of the said congregation, the said several persons foresaid are bound and obliged, conjunctly and severally, to make payment to him of the said sum of £105 sterling,’ &c. Against this claim Nairne and others, who had seceded, pleaded in defence, that they were not bound to adhere either to Hyslop or the congregation longer than they thought fit ; that they were

not liable in stipend after they had ceased to be members:—that it was never intended that, by subscribing the call, they were to be liable, conjunctly and severally, for his stipend during his life or incumbency:—that, accordingly, no such obligation was entered into:—and that his claim was good against those only who availed themselves of his services as a clergyman. To this it was answered; That although the defenders were not bound spiritually to adhere, yet they could not by their own act free themselves from the civil obligation which they had undertaken to pay the stipend, and on the faith of which Hyslop was induced to accept of the office.—Lord Gillies found, that ‘the defenders, who regularly became members of the congregation mentioned in the libel, are, during their respective lives, jointly and severally, liable to the pursuer, while he continues minister of the said congregation, for payment of the yearly sum and house-rent stipulated to be paid to him, as specified in the libel.’ But Lord Meadowbank found, ‘That they are not liable to the pursuer for annuity falling due from and after the time they retired from his ministry and congregation;’ and therefore assoilized them. To this interlocutor the Court, after a hearing in presence, and on the report of Lord Probationer Forbes, by a majority, adhered; and thereafter, on advising a petition and answers, again adhered.

The LORD PROBATIONER concurred in the interlocutor which had been pronounced by Lord Meadowbank.

LORD GILLIES remained of the opinion which he had expressed in his interlocutor, and held that an effectual civil obligation had been undertaken, from which the defenders could not free themselves by their own act in deserting the congregation.

The other Judges, however, held, that as there was no specific written obligation to that effect, the case must be judged of by what was the understanding of parties; and that the idea of each member being liable during his life for the stipend (although he had ceased to have any connexion with the congregation) was so extravagant, that it was impossible it could ever have entered into the contemplation either of them or of the pursuer.

BURD, MACMILLAN, and MILLER, W. S.—R. WILSON,—Agents.

Major J. M'DONELL, Suspender.—*A. Wood.*

No. 70.

R. DONALDSON, Charger.

*Bill of Exchange.*—Non-onerous only proveable by the holder's writ or oath.

DONALDSON, formerly factor to M'Donell of Glengarry, having charged the present factor, Major M'Donell, to pay a bill accepted by him for £56, the latter presented a bill of suspension, alleging that he had granted it at Donaldson's request, to show to his creditors that something was due him by Glengarry, and that he had promised not to enforce payment of it. To this Donaldson answered, that the allegation was only proveable by his writ or oath,—and that, in fact, the bill was granted for his factor fee. The Lord Ordinary, on considering the bill with answers, allowed 'the suspender to prove, by the oath of the charger, that the bill charged on was granted merely for the accommodation of the charger, and not in payment or security of a debt due by Mr. M'Donell of Glengarry to the charger.' Against this interlocutor Major M'Donell reclaimed, contending that, in the circumstances of the case, he was not bound to have recourse to the charger's oath; but the Court refused his petition without answers, except as to the qualification adjoined to the reference, 'and not in payment or security of debt due by Mr. M'Donell of Glengarry to the charger,' which their Lordships recalled.

June 14. 1825.

2d DIVISION.

Bill-Chamber.

Lord Mac-

kenzie.

F.

JAMES M'DONELL, W. S.—GIBSON and OLIPHANT, W. S.—Agents.

Reverend J. BRYDEN, Petitioner.—*Matheson.*

No. 71.

J. SCOTT, Respondent.—*Moncreiff.*

*Process—Proof to lie in Retentis.*—An application for the examination of aged witnesses to lie in retentis, granted in a process depending before the Lord Ordinary; but observed that the correct form was to apply to the Ordinary.

THIS was an application at the instance of Bryden, the defender in an action depending before the Lord Ordinary, and in which a condescendence had been lodged by Scott, the pursuer, to have the depositions of old witnesses taken to lie in retentis. The Court granted authority for the examination of aged witnesses on both sides, a verbal application being also made at the bar on the part of the pursuer, and not objected to by the defender.

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2d DIVISION.

M'K.

The Court, while they granted the prayer of the petition, stated, that the application ought to have been made to the Lord Ordinary, before whom the cause was depending; and that it was only in the case where an action was not yet brought into Court, that it was necessary to apply to the Inner House.

MACRITCHIES, BAYLEY, and HENDERSON, W. S.—Agents.

No. 72. J. M'CULLOCH, Pursuer.—*Greenshields—Jeffrey—Marshall*.  
A. M'DPUALL and Others, Defenders.—*Dean of F. Cranston—*  
*Fullerton—Dundas*.

*Previous Expenses*.—Circumstances in which a party bringing forward a new plea, after a litigation on other points, was found not liable in the previous expenses.

June 14. 1825.

2D DIVISION.  
Lord Cringletie.  
M'K.

IN an action at the instance of M'Culloch against M'Douall and others, for setting aside purchases of parts of the entailed estate of Barholm, made under the authority of an act of Parliament, the Lord Ordinary repelled certain objections stated by M'Douall &c. to M'Culloch's title to pursue, and found them liable in a certain portion of expenses. On a petition, however, to the Court, their Lordships, considering some of the questions of title much involved with the merits, recalled the Lord Ordinary's interlocutor, repelled the objections only in *hoc statu*, and appointed the production to be satisfied, under reservation of all objections to the title, in so far as blended with, or arising out of the merits of the cause, without any finding as to expenses. In a second reclaiming petition, M'Douall &c. brought forward a new objection to M'Culloch's title, founded on a discovery lately made, and of which neither party had been aware, of a discrepancy between the destinations in the titles made up by M'Culloch as heir of entail, and the original deed of entail itself. As this objection appeared to the Court to be very material, and not to be involved in the merits, their Lordships remitted to the Lord Ordinary to hear parties thereon. His Lordship, on a demand made by M'Culloch, that before the defenders were heard on the new objection, they should pay the expenses previously incurred, found M'Douall &c. liable in these expenses; but the Court unanimously recalled his Lordship's interlocutor, reserving consideration of all questions of expenses till the issue of the cause.

The Court considered this case to be totally different from that of Agnew, (*ante*, Vol. III. No. 583.) because there the Court had

repelled Agnew's pleas, and found him liable in expenses, after which he brought forward his new objection; whereas, in the present case, the defenders had, to a certain extent, been successful in their previous litigation, and their original pleas were not yet finally disposed of. It was also observed, that the proper time for making this claim for previous expenses was when the Court made the remit to the Lord Ordinary; and that his Lordship could not subject the defenders in expenses, seeing that, by the interlocutor of Court, his Lordship's former decerniture for these expenses was recalled.

J. FORMAN, W. S.—VANS HATHORN, W. S.—Agents.

PRINCIPAL OFFICERS of the ORDNANCE, Pursuers.—*Sol.-Gen. Hope—Alison.*

No. 73.

HERITORS and KIRK-SESSION of NORTH LEITH, Defenders.—*Moncreiff—Cockburn.*

*Poor's Assessment—King's Property.*—Held that the Crown, having acquired property from a subject, on which a military fort was built, was liable in poor's rates, although it was alleged that none had been assessed, in respect of that property, previous to the acquisition.

IN 1781, the Officers of Ordnance acquired, for the use and behoof of His Majesty, about an acre and a half of ground in the parish of North Leith, on which was erected a military fort. It did not appear that, prior to the acquisition by the Crown, any assessment had been levied for the poor in the parish of North Leith; but, in 1821, the Heritors and Kirk-Session, having imposed an assessment, claimed £15 from the Officers of Ordnance, as the rateable proportion for Leith Fort, still occupied solely as a military station, the value of which, including the buildings erected thereon, they estimated at £600 a year. The Officers of Ordnance then raised an action, concluding to have it declared that the Fort was not subject to poor's rates; or, if it should be found to be so, that it was rated at too great a proportion. In support of their action, they contended, that by the law of Scotland, as by that of England, Crown property was not liable to taxation, except in so far as beneficially possessed by a subject, which was not the case here; and that although property acquired by the Crown had been found liable, it was only to the extent which had been in use to be levied prior to the acquisition. On the other hand, it was pleaded in defence, that the Crown, in acquiring property, utitur jure communi; that, by the decisions in the case of Bruce and Milroy, the general

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Lord Cringletie.  
F.

principle was established, that the Crown, by acquiring the property of a subject, did not thereby escape the burdens to which the individual would have been liable, had he remained proprietor; and that it was of no importance whether poor's rates had been levied or not, as the liability existed, though it had not been operated on. The Lord Ordinary found, 'That the ground in question, on which Leith Fort is built, is liable to be taxed for poor's rates, in the same manner that it would have been, had it continued the property of a subject; but that, in estimating its value or rent, in order to impose assessment, the meliorations thereon, by buildings or other works for the public service, cannot be brought into computation;' and assolizied the defenders from the conclusions of the libel. To this interlocutor the Court, by a majority, adhered, except in so far as it assolizied from the conclusion as to the rate of assessment, as to which they remitted to the Lord Ordinary to hear parties.

**LORD JUSTICE-CLERK.**—It is a material fact in this case, that previous to the acquisition of the ground on which Leith Fort stands, there had been no assessment for the poor; and, from this peculiarity, the cases of Bruce and Milroy are not authorities in the present one. In that of Milroy, the judgment proceeded on the principle, that the property had been in use to pay poor's rates; and the other case related to cess, which is a burden attaching to the lands themselves, and must follow them wherever they go. The burden of poor's rates is not leviable from the land, but from the inhabitants, the land being merely the means of apportioning the amount; and the King cannot be considered in the light of a person liable in individual taxation.

**LORD ROBERTSON.**—The general proposition maintained by the pursuers, that Crown property is not subject to taxation, is a great deal too broad. In 1587, a large extent of church property was annexed to the Crown by the act of general annexation. By 1594, c. 335, this property and all church lands were ordained to be retoured, that they might be taxed. In 1597, forty shillings were appointed to be raised on each pound land of the King's property; and the Crown lands continued to be taxed, as appears from statute 1633, c. 1, and other acts of the Scottish Parliament. In modern times, too, the acts 43. Geo. III. c. 161, and 48. Geo. III. c. 55, imply the liability of Crown property to taxation. As to the tax in question, it may be true that it could not be recovered by poiding of the ground, and that it is a burden on the heritors; but still it is imposed on them in respect of their lands; and the King, in acquiring lands, utitur jure communi.

**LORD PITMILLY.**—It is no doubt true, that the original property of the Crown is not assessable. But, on the acquisition of land belonging to a subject, the Crown, as an heritor, cannot be exempted, because that would increase the burden on other heritors. There is not much weight due to the plea, that the lands were not assessed before the acquisition by the Crown, because the question is, whether they were liable; and if so, then the Crown comes in place of the heritor. Assessment for the poor is, no doubt, a personal burden; but it is imposed on the heritors solely as such, and the Crown must be liable like any other heritor.

**LORD GLENLEE** inclined to agree with Lord Justice-Clerk, and observed—Poor's rates are merely the enforcement, by act of Parliament, of the Christian duty of charity; and unless the King is liable to have this duty enforced, he cannot be subjected in assessment; and, at all events, the rate must be imposed according to the original value of the ground, and not according to the value, as increased by the buildings for the public service.

**LORD ALLOWAY** concurred with Lords Robertson and Pitmilly, and further observed—The authorities quoted for the pursuers from the law of England cannot be listened to here, as they all have reference to the effect and meaning of the English statute of Elizabeth respecting the poor. The cases of Bruce and Milroy, decided in this Court, settle the principles which must regulate this case; for if the King cannot be liable as an heritor, it is impossible that use of payment by a subject, prior to his acquisition of the property, could subject him.

*Pursuers' Authorities.*—Lord Amherst v. Lord Somers; 2. Duraf. 372; The King v. Cook; 3. Duraf. 519; The King v. Terrot; 3. Earl, 506; Locality of South Leith, 1812, (not rep.)

*Defenders' Authorities.*—Bruce, Nov. 28. 1810, (F. C.); Milroy, Nov. 21. 1815, (F. C.); Rom, June 8. 1824, (ante, Vol. III. No. 81.)

**J. and C. NAIRNE, W. S.—A. DOUGLAS, W. S.—Agents.**

No. 74.

R. SPEIR, Pursuer.—*Bell—Shaw.*JAS. DUNLOP, Defender.—*Moncreiff—Cunninghame.*

*Stat. 1696, c. 5.—Bankrupt—Verdict.*—Held,—1.—That a payment in cash by a bankrupt, within 60 days from his bankruptcy, to an indorser on a bill accepted by the bankrupt, as a provision for payment of the bill when it should become due, is not struck at by the act 1696, c. 5;—and,—2.—That, after a verdict, the judicial admissions of a party cannot be founded on.

June 15. 1825.

2D DIVISION.

Lord Eldon.

F.

SPEIR, as trustee on the sequestrated estate of John Dunlop, brought an action against James Dunlop, the nephew of the bankrupt, stating, that on the 6th of September 1820, the bankrupt, being desirous to raise money, granted a bill for £220 to James, who discounted it with the Commercial Bank at Beith, payable on the 9th December thereafter—that James having discovered the insolvent situation of the bankrupt, entered into a contrivance or device with him, by which the bankrupt agreed to sell his heritable property to another uncle of James—that, accordingly, the property was sold on the 18th of October, and the price put into the hands of James, as a provision for payment of the bill when it should become due—that, within 60 days thereafter, John was rendered bankrupt—that his estates were sequestrated on the 2d of December—and that, on the 9th, James had retired the bill by means of the proceeds of the sale, and thereby obtained a preference. He therefore concluded that the transaction, so far as regarded James, should be set aside, on the ground that it was an evasion of the act 1696, c. 5, or a fraud at common law, and that he should be ordained to repay the money. In defence James pleaded, 1. That as it was a payment in cash, the transaction did not fall under the act 1696; and, 2. That there was no fraud. Lord Mackenzie remitted the case to the Jury Court, and these issues were sent to trial: ‘It being admitted that a bill for £220, dated 6th September 1820, payable three months after date, and due on 9th December 1820, accepted by John Dunlop, was indorsed by James Dunlop, and discounted at the branch of the Commercial Bank at Beith, previous to the 18th October 1820: It being also admitted that the estate of the said John Dunlop was sequestrated on the 2d day of December thereafter: It being also admitted that the said John Dunlop sold to William Dunlop, uncle to James, certain houses for the sum of £600, on 18th October 1820: Whether, within 60 days of the admitted bankruptcy of the said John Dunlop, the defender James Dunlop did enter into an agreement or concert with the



‘ said John Dunlop, the bankrupt, for the purpose of obtaining security or payment of the foresaid bill for £220, and did for that purpose contrive and assist in carrying into execution the sale of the bankrupt’s heritable property aforesaid? And whether the defender, by means of the said bill, did obtain from the said John Dunlop the sum of £220, out of the proceeds of the said sale, on the said 18th day of October 1820, or previous to the 9th day of December 1820, in satisfaction of the said bill, or as a provision for payment of the said bill when it became due?’ On this issue a verdict was returned, finding ‘ that within 60 days of the admitted bankruptcy of the said John Dunlop, the defender James Dunlop did not enter into any agreement or concert with the said John Dunlop, the bankrupt, for the purpose of obtaining security or payment for £220; and that the defender James Dunlop, by means of the sale, did obtain from John Dunlop, by the hands of his wife, the sum of £220, on the said 18th of October, as a provision for payment of the said bill when it became due.’ The cause having come back to have this verdict applied, Lord Eldin, in respect of certain facts admitted by the defender in his declaration under the sequestration, and that ‘ the verdict of the Jury, though it is silent with respect to some of these circumstances, contains nothing sufficient to take off their effect,’ found that the sale and payment were an evasion of the act 1696, and reduced in terms of the libel. On a petition, however, to the Court, their Lordships recalled this interlocutor, found that the case must be determined on the verdict alone, and appointed a hearing in presence as to the legal effect of the finding of the Jury. In relation to it, Speir contended, 1. That in viewing the verdict complexly, there were sufficient materials for showing that James Dunlop had obtained his preference by a fraud against the other creditors; and, 2. That, at all events, as it was found by the Jury that the money had been procured by means of the sale, and had been given, within 60 days of the bankruptcy, as a provision for payment of the bill when it became due, it was struck at by the act 1696, c. 5. To this it was answered, 1. That the verdict proved that there was no fraud; and, 2. That such being the case, the payment was one in cash, and so not affected by the statute. The Court, by a majority, repelled the reasons of reduction, and assolizied.

**LORD PITMILLY.**—The verdict of the Jury completely negatives the allegation of concert or contrivance; and all that remains as a ground

of reduction, is the payment of money to retire a bill not yet due. Payment of money, however, is one of the exceptions from the act 1696, unless when accompanied by fraud, which is now out of the question in this case. The only difficulty arises from the payment having been made before the bill fell due; but that is not now a relevant circumstance; its only effect would be as a proof of fraud, which is negatived by the Jury; and in no other view can it have the effect of bringing the payment under the act 1696.

**LORD GLENLEE**.—There may possibly be cases where payment of a bill, before it becomes due, is not suspicious: as, when a party has money in his hands for which he has no immediate use, he may perhaps purchase up his own bill before it becomes due. In this case, however, the money was not given to the defender to take up the bill at the time, but as a deposit, that he might take it up when it did become due. It was a deposite, to secure him against eventual loss, in case the bill should not be paid; and this deposite cannot be sustained, without establishing the doctrine, that a bankrupt may, within 60 days of his bankruptcy, give money to persons bound for him in cautionary obligations, to secure their relief when that obligation is actually operated on.

**LORD JUSTICE-CLERK**.—It is clear that the Court cannot go beyond the verdict in deciding this case. They are, however, bound to look at the summons, which is important, as establishing the defender to have been a creditor at the date of the payment in question; and it is not stretching this too far to adopt the explanation made by the defender's counsel, that he had paid the bankrupt £220 for the bill, and then discounted it. He was therefore a creditor at this time, and cannot be viewed in the light of a cautioner; for, if he was to be so considered, Lord Glenlee's observations would have great weight; but being a creditor, and receiving payment in money, without any fraud or contrivance, as must be held under the verdict, the transaction is neither objectionable at common law, nor under the act 1696.

**LORDS ROBERTSON AND ALLOWAY** concurred with Lords Justice-Clerk and Pitmilley.

*Defender's Authorities*.—Dundas, June 2. 1806; Jameson, Jan. 23. 1820; Ferriar, June 2. 1808, (2. Bell, 229, note); No. 28. Ap. Bank.

W. PATRICK, W. S.—R. DUNLOP, W. S.—Agents.

F. GORDON, Suspender.—*Forsyth*.  
T. CRAWFORD, Charger.—*A. McNeill*.

No. 75.

*Tack—Urban Tenement.*—Circumstances in which it was held that a tenant of an urban subject for one year was not entitled to sublet it without the consent of the landlord.

CRAWFORD let a shop in Port-Glasgow to Gordon, a surgeon and apothecary, for one year from Whitsunday 1823; but Gordon having determined on leaving Port-Glasgow, he, before the term of entry, sublet it to one Cullens, a grocer or huckster, whom, it was alleged, he knew to be obnoxious to Crawford. Cullens having entered into possession, Crawford presented a petition to the Magistrates of Port-Glasgow, praying to have him ejected, and to have Gordon prohibited from subletting the shop to any person without his approbation. The Magistrates granted the prayer, and found Gordon liable in expenses. Gordon, having been charged for these expenses, brought a suspension, and contended that he was entitled to sublet the shop. The Lord Ordinary found the letters orderly proceeded, and the Court, by a majority, adhered.

June 15. 1825.

2d Division.

Lord Mac-  
kenzie.

F.

**LORD JUSTICE-CLERK.**—There seems no authority for holding, that when an urban tenement is let for a single year, and for a special purpose, the tenant can sublet it to another person, and for another purpose; and besides, in this case, a person disagreeable to the landlord was put in.

**LORD ROBERTSON.**—The tenant here had only right to the shop for one year, and in this it differs from the cases quoted. A lease of an urban tenement implies a *delectus personæ*, so as to prevent the tenant subletting, particularly for a different purpose.

**LORD GLENLEE** also thought the interlocutor right.

**LORD PITMILLY.**—This is a case to be decided on its own peculiar circumstances. If the interlocutor is to be adhered to, it should be on the ground of Cullens being particularly disagreeable to the landlord; for, on the general point of law, it has always been understood that a tenant is entitled to sublet an urban tenement, although, undoubtedly, for something of a similar purpose to that for which he took it. But there certainly is no such difference between a grocer or huckster, and an apothecary, as to form a bar to the sublet here.

**LORD ALLOWAY** concurred with Lord Pitmilley, and observed—The lease of an urban differs entirely from that of a rural tenement. There is no such *delectus personæ* in the former as in the latter; and there is no authority for holding that, as to the former, the tenant

may not subject, provided he does not totally change the use of the subject. But the change here did not alter the use of the shop. If it were offered to be proved that there was a good personal objection to Cullens, and that Gordon knew of it, the case would be taken out of the general rule; but, as it stands, the judgment of the Inferior Court is contrary to law.

*Suspender's Authorities.*—Binny, Jan. 7. 1748; Alexander, July 10. 1817.

*Charger's Authorities.*—Miln, Feb. 23. 1787, (15254); Heriot, Jan. 31. 1804, (15255.)

J. STUART,—W. GUTHRIE,—Agents.

No. 76.

R. MOFFAT, Suspender.—*Shaw.*

MISS CALDERHEAD and Others, Chargers.—*Dickson.*

*Heritable Security—Power of Sale.*—1.—Whether a debtor entitled to object that the titles of an heritable creditor are not complete.—2.—Whether it is a sufficient objection against a sale, that the schedule of intimation is not dated, intimation not being denied;—and,—3.—Whether the creditor is affected by mora in carrying the sale into effect.

June 16. 1825.

1st Division.  
Bill-Chamber.  
Lords Craigie  
and Medwyn.  
8.

MOFFAT granted over certain subjects an heritable bond, to which the chargers subsequently acquired right. By that deed he gave a power of sale, to be carried into effect if he should fail to make payment at the stipulated period, 'within six weeks after a demand of payment is intimated to me, or my heirs and successors, (the foresaid term of payment being elapsed,) personally, or at our dwelling-places,' &c. The term of payment having elapsed, and Moffat having failed to pay the debt, the chargers, on the 9th of February 1824, made the requisite intimation that they intended to sell the property. With this, however, they did not proceed till the month of March 1825; and Moffat then presented a bill of suspension and interdict, containing, 1. That the chargers had not correctly made up their titles; 2. That the schedule of intimation which had been served upon him was not dated; and, 3. That, in consequence of the delay in carrying the sale into execution, the chargers were not entitled to proceed without a new intimation. To this it was answered, 1. That the titles were complete, and, at all events, Moffat had no right to object to them; 2. That the principal instrument of intimation was dated, and the fact of intimation was admitted; and, 3. That the delay was an indulgence to Moffat, of which he could not complain. The Lord Ordinary refused the bill, and the Court adhered.

C. FISHER,—J. LANG, W. S.—Agents.

G. SINCLAIR, Advocate.—*Jameson—Shaw.*J. BRYSON, Respondent.—*Cockburn—Ivory.*

No. 77

*Agent and Client.*—Held,—1.—That dues paid to the concurrents of a messenger, gaol fees, and the necessary expense of keeping a debtor in a tavern, who had been apprehended during the night and when the gaol was shut, were lawful charges by an agent against his employer;—and,—2.—That the account of a law agent relative to an action was to be taxed according to the regulations of the Court before which it depended.

SINCLAIR, a writer in Glasgow, was employed by Bryson to raise an action against Torrance for a debt of £9. 5s. He accordingly did so, obtained decree, and raised diligence, on which Torrance was apprehended, but afterwards liberated in consequence of Stevenson granting a letter of presentation. Torrance not having been presented, Sinclair constituted the debt against Stevenson, and, by the orders of Bryson, arrested a quantity of wheat belonging to him. Having got decree, diligence was raised, and Stevenson was, after a search, apprehended in Glasgow during the night; and as the prison was shut, he was carried to a tavern by the messenger and his concurrents, to be kept in custody till the morning, when he was incarcerated, but was afterwards liberated under the Act of Grace. The debt and expenses were ultimately recovered by a sale of the wheat; but another creditor of Stevenson having claimed a share in virtue of an arrestment, a litigation took place, in which a considerable expense was incurred. Sinclair having brought an action against Bryson for payment of his account, the Sheriff of Larkshire assolizied Bryson, on the ground that Sinclair had no authority to liberate Torrance on receiving the letter of presentation, and reserved a claim of damages against him for having done so. Sinclair having advocated, the Lord Ordinary found that he had sufficient authority; found Bryson liable in payment of the account; and, before answer, remitted it to the auditor of Court to be taxed. The auditor struck off the sums which Sinclair had paid to the concurrents of the messenger, the expenses of keeping Stevenson at the tavern, and also the gaol dues; and taxed the charges according to a rule different from that of the Sheriff Court of Glasgow, where the judicial proceedings occurred. Against this Sinclair objected, and contended that the outlays were lawful, and that the auditor was bound to have taxed the account according to the regulations of the Inferior Court. Lord Eldin sustained the objections quoad the outlays, and remitted 'of new to the auditor to examine the

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Lords Alloway  
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S.

‘ other articles objected to, and to tax the same according to the  
‘ established printed regulations of the Sheriff Court of Glasgow,  
‘ and to report.’ To this interlocutor the Court adhered.

C. FISHER,—ANDERSON and WHITEHEAD, W. S.—Agents.

No. 78.

Mrs. HAY, Pursuer.—*Marshall*.

W. HORN, Defender.—*Jardine*.

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1st DIVISION.

Lords Alloway  
and Eldin.

H.

Mrs. HAY having brought an action against Horn for payment of the rent of a bleachfield, he pleaded in defence, inter alia, that he was entitled to deduction for the enlargement of a boiling-house which he alleged she was bound to have made. The Lord Ordinary, finding no evidence of this, repelled the defence, and the Court adhered.

D. and A. THOMSON, W. S.—J. LYON,—Agents.

No. 79.

D. BLAIR, Petitioner.—*Buchanan*.

MAGISTRATES of BRECHIN, Respondents.—*Moncreiff*—*Neaves*.

*Proof to lie in Retentis*.—Old witnesses allowed to be examined, and their evidence to lie in retentis, although the summons had not been called when the application was made.

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2d DIVISION.

F.

BLAIR, having executed a summons against the Magistrates of Brechin, presented a petition, praying for a warrant to take the examination of old witnesses, to lie in retentis. Answers were put in for the Magistrates, objecting that the summons had not been called in Court. This had been done, however, before the case came to be advised; and Blair having also lodged a condescendence of the matters on which he proposed to examine the witnesses, the Court granted warrant to take the deposition of witnesses on both sides.

GEO. HOGARTH, W. S.—T. DEUCHAR,—Agents.

No. 80.

Mrs. JANET MASSON, Pursuer.—*D. Macfarlane*—*Cuninghame*.

P. CAMPBELL, Defender.—*Cockburn*—*Rutherford*.

June 16. 1825.

2d DIVISION.

Lord Cringletie.

F.

THIS was a question relative to the amount to be paid by Campbell as the rent of a coach-office, which it had been agreed should be settled by arbiters, on the failure of whom this action was raised. On advising a proof as to the value, the Lord Ordinary and the Court found Campbell liable in a yearly rent of £50.

GREIG and PEDDIE, W. S.—J. CAMPBELL jun. W. S.—Agents.

MAGISTRATES of AYR and Others, Suspenders.—*Dean of Fac.* No. 81.

*Cranstoun—Jeffrey—Campbell.*

Rev. Dr. AULD, Changer.—*Sir J. Connell.*

*Manse—Jurisdiction—Expenses.*—Held,—1.—That a minister of a royal burgh, with a landward district attached, has no legal claim to a manse under the act 1663;—2.—That special circumstances may give him such a claim;—3.—That presbyteries have no jurisdiction relative to a claim for a manse, except in so far as it is founded on the act 1663;—and,—4.—That parties successful in obtaining a suspension of a decree of an Inferior Court, on the ground of want of jurisdiction, may still be subjected in expenses, in respect of their not stating the objection in proper time.

THE united parishes of Ayr and Alloway consist of the royal burgh of Ayr, with a landward district attached to it, and the landward parish of Alloway. In 1814, Dr. Auld, the incumbent of the first charge, presented an application to the presbytery of Ayr to have the Magistrates and other heritors ordained to build a manse. Having obtained a decree for £1200 for that purpose, the Magistrates and heritors brought a suspension, on the ground that the minister of a royal burgh, with a landward district attached, was not entitled to a manse. The case having been reported by the Lord Ordinary, the opinion of the Judges of the First Division and of the Outer House was requested on the question, ‘Whether the charger, independently of all specialties, is by law entitled to have a manse designed to him as minister of the united parishes of Ayr and Alloway.’ Their Lordships returned the following opinion: ‘The Judges are unanimously of opinion, that independent of all specialties, the charger is by law entitled to have a manse designed to him as minister of the united parishes of Ayr and Alloway. In point of principle, the Judges cannot see any distinction between a royal burgh having a landward parish, and a burgh of regality and barony having the same; 2. They consider the point to have been fixed by the judgment of the House of Lords in the case of Dunfermline, which, they have always understood, proceeded on the general principle. Indeed it appears to the Judges, that the specialties founded on, all bore the other way.’ The majority of the Second Division, however, differing from this opinion, found ‘that the charger has no right to a manse under the act 1663,’ but allowed him to condescend on such specialties as he conceived entitled him to a manse, ‘independent of the act of Parliament.’ The specialties founded on by the charger were, 1. That the parish of Alloway, which had been united to that of Ayr about 1692, was, prior to that year, a

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F.

strictly landward parish ; 2. That a large part of the parish of Ayr proper was a landward district ; 3. That the old parish of Ayr was anciently a parsonage ; 4. That there was a glebe attached to each of the parishes of Ayr and Alloway ; 5. That there had been at one period a manse attached to the benefice of Ayr ; and, 6. That the Magistrates of Ayr had paid manse-rent to the minister for nearly two centuries. In answer, the Magistrates &c. contended that a clergyman could have no legal claim to a manse, except in virtue of the act 1663, or of private agreement and contract ; and that the payment of the manse rent (which alone of the specialties founded on could infer such an agreement) was, in the books of the town, specially mentioned as a gratuity. The Court having, after a great deal of litigation, found the letters orderly proceeded in respect of these specialties, the Magistrates &c. reclaimed, and, besides their pleas on the merits, they contended that presbyteries had no jurisdiction to design a manse, except in virtue of the act 1663 ; and therefore, as it had been finally determined in this case that the charger had no right under that act, the decree of the presbytery must be suspended, as having been pronounced in a matter in which they had no jurisdiction. To this it was answered, that the jurisdiction of presbyteries relative to manses depended not on the act 1663, but on usage, in the same way as their jurisdiction in reference to the building of churches, and designing certain descriptions of glebes, as otherwise they could have no jurisdiction in regard to manses, even under the act 1663, seeing that that act confers no powers whatever on the bishops, whom alone it mentions, and that any authority which may be supposed to have been committed to them, was never subsequently transferred to the presbyteries ; and, at all events, that the charger had prorogated the jurisdiction. The Court being equally divided on this point, Lord Cringletie was called in to vote in place of Lord Alloway, (who, as an heritor of the parish, declined judging,) and their Lordships suspended the letters, but at the same time found the Magistrates liable in expenses from a certain date, on the ground that they ought to have brought forward the objection to the jurisdiction of the presbytery at an earlier stage of the cause.

**LORDS JUSTICE-CLERK and GLENLEE** held that the jurisdiction of the presbytery was not founded on or limited by the act 1663, but that they were entitled by usage to determine generally on the claim of a clergyman to a manse, and, in judging of that claim, to take into view special grounds, as well as the right under the act 1663.





LORDS ROBERTSON, PITMILLY, and CRINGLETIE, on the other hand, thought that the presbytery had no power to judge as to the claim for a manse, except in so far as it was founded on the act.

*Suspenders' Authorities.*—(Merits.)—Hales' Canons of the Church, c. 13; 1568, c. 72. 1572, c. 48. 1612, c. 8.—(Jurisdiction.)—1663, c. 21; 2 Ersk. 10. 56; 1 Ersk. 2. 29. *Charger's Authorities.*—(Merits.)—2 Ersk. 10. 25; 2 Bank. 8; 1644, c. 21; Dunfermline, Nov. 19. 1805, (No. 1 Ap. Manse); Linlithgow, March 5. 1802, (in a note to report of case of Dunfermline, *supra*).—(Jurisdiction.)—Boyd, Jan. 24. 1760, (7617); Linlithgow and Dunfermline, *ut supra*.—(Expenses.)—Speirs, Feb. 21. 1823, (*ante*, Vol. II. No. 212.)

J. KERMAK, W. S.—RUSSELL, TOD, and HILL, W. S.—MURRAY and INGLIS, W. S.—Agents.

T. THORBURN and W. STEWART, W. S. Petitioners.—*M'Neil*. No. 82.  
C. GRAHAM and Others, Respondents.—*Shaw Stewart*.

4.2 Feb. 6. 1806.—A petition for a remit to the auditor to tax an agent's account, incompetent where his employment is denied.

THORBURN and STEWART presented a petition to the Court, alleging that Graham and others, creditors on a sequestrated estate, had employed them as agents, and, founding on the A. S. 6th February 1806, prayed to have their accounts remitted to the auditor to be taxed, and decree pronounced in terms of his report. Graham and others denied the employment, or that they were liable for the debt; and therefore contended that the petition was incompetent, because the A. S. was applicable only to those cases where the employment was admitted. The Court sustained this defence, and dismissed the petition as incompetent.

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1st DIVISION.  
D.

The Court were of opinion, that where a party denied his liability, it was necessary for the agent to constitute his debt by an ordinary action.

T. THORBURN and W. STEWART, W. S.—MACKENZIE and SHARP, W. S.—Agents.

No. 83.

Mrs. CLARK, Pursuer.—*Matheson*.W. MITCHELL, and RAMSAYS, BONARS, and COMPANY, Defendants.—*Moncreiff—Tawse—Gibson—Craig*.*Exhibition*.—Whether a banker is bound to exhibit his books to an executor, on an allegation that the defunct did business with him.

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1st Division.  
Lords Alloway  
and Eldin.  
D.

THIS was a question of expenses, arising out of an action brought by the pursuer, on the allegation that the late Elizabeth Murray, of whom she was executrix, had died possessed of money; that no vouchers had been found in her repositories; and that there was reason to believe that she had done business with the defenders as bankers; and that as they had declined extrajudicially to exhibit an account, they should be ordained to do so on oath. Mitchell admitted that the deceased had transacted business with him, and stated that he had given a copy of her account, and that he had only declined to allow the pursuer and her agents to make an indiscriminate search into his books; but that he was perfectly willing to allow them to be examined by a commissioner under the authority of the Court. Ramsays, Bonars, and Company, made a similar statement, except that they denied that they had any account with the deceased. The pursuer having failed, after the execution of a diligence, to show that the deceased had any account with Ramsays, Bonars, and Company, or any with Mr. Mitchell, except that which he had admitted, the Lord Ordinary assoilzied them, and found them entitled to expenses. The Court adhered.

C. STEWART,—GIBSON-CRAIGS and WARDLAW, W.S.—C. TAWSE, W.S.  
—Agents.

No. 84.

Dr. A. HAMILTON, Suspender.—*Gillies*.T. KINNEAR and SONS, Chargers.—*Sol.-Gen. Hope—Menzies*.*Bill of Exchange—Vitiation*.—A bill of suspension of a charge on a bill vitiated in the term of payment, passed simpliciter.

June 17. 1825.

1st Division.  
Bill-Chamber.  
Lord Medwyn.  
S.

KINNEAR and SONS having charged Dr. Hamilton to pay a bill accepted by him, and drawn by one Hanson, payable apparently on the 15th May 'eighteen hundred and twenty-five,' he presented a bill of suspension, alleging that the bill was vitiated in the term of payment, which had originally been 15th May 'eighteen hundred and twenty-six.' On the back of the bill, and immediately opposite to the word '*five*,' there was a wafer, and the re-

mains of another piece of paper, to which the bill seemed to have been affixed, and for which it had been afterwards separated. The letters of the word 'five' corresponded in general with the handwriting of the rest of the bill; and the only difference was, that the ink appeared to have run a little, as if the paper had been wetted. Kinnear and Sons stated, that the bill had been discounted with them by Hanson in its present condition; that it was not vitiated; and that the reason of the wafer being attached to it was, that Hanson had affixed it to his testament, and had intended to bequeath it to a person there named. The Lord Ordinary refused the bill, and stated in a note, that he had 'examined the promissory note charged on, before pronouncing the 'above interlocutor.' Dr. Hamilton having reclaimed, the Judges, on inspecting the bill, were in general of opinion that there was no vitiation; but as the allegation was insisted on, the Court, of consent of parties, remitted to George Forbes, Esq. banker, and Messrs. Kirkwood and Mitchell, engravers, Edinburgh, 'to examine the bill in question, and report their opinion whether the 'same has been vitiated by alteration, erasure, or otherwise.' Having reported that they 'concur in opinion that the same has 'been vitiated by alteration, erasure, or otherwise,' the Court altered, and passed the bill of suspension, without caution or consignation.

*Suspender's Authorities.*—1. Bell, 301. 304; Bryce, Nov. 16. 1810, (F. C.); Chitty, 130. 123.

T. SYME, W. S.—MACKENZIE and SHARP, W. S.—Agents.

JAMES MURRAY and Others, Petitioners.—*Skene—Marshall.*

No. 85.

Mrs. KERR, Respondent.—*Moncreiff—A. Murray jun.*

*Judicial Factor.*—Circumstances in which a petition for a judicial factor refused.

MURRAY and others presented a petition, alleging that they had an eventual interest in certain moveable property possessed by Mrs. Kerr; that she was dilapidating it, and, from her age and other circumstances, was unable to attend to the management of it. They therefore prayed for the appointment of a judicial factor, with the usual powers. This was resisted, on the ground that the petitioners had no title; that the application was, in the circumstances, incompetent; and that the allegations were unfounded. The Court, without stating on what particular ground, refused the petition.

June 17. 1825.

1st Division.  
H.

MACMILLAN and GRANT, W. S.—A. DOUGLAS, W. S.—Agents.

No. 86.

Misses GRAY, Advocators.—*Sol.-Gen. Hope—Wight.*JAMES GREIG, W. S. Respondent.—*Cockburn—Cunninghame—Neaves.*

*Property—Urban Tenement.*—Held, that a proprietor of the sunk and street flats of a house is entitled to convert them into shops, although this is resisted by the proprietors of the upper flat,—persons of skill reporting that the alterations can be made with perfect safety, and without reasonable apprehension of danger.

June 18. 1825.

1st Division.  
Bill-Chamber.  
Lord Hermand.  
S.

GREIG, the proprietor of the sunk and street flats of the corner tenement on the west side of North Hanover-street, Edinburgh, fronting that street and George-street, presented a petition to the Dean of Guild, praying for authority to make certain alterations on the premises, in order to convert them into shops. On the side fronting George-street, and on the street floor, there was a door with two windows on each side, and he proposed to convert the two extreme windows into doors, by lengthening them in the usual manner, and by widening them three inches and a half on each side, being seven inches in all. The other two windows he intended to widen in the same manner, by removing the rybat heads, and retaining them as windows. On the side towards Hanover-street there were three windows, which he proposed to widen in the same manner as the others, and to strike out a window in the sunk story, immediately under one of those which were above. In the front of the whole there was to be a projection from the main wall, by means of stone plating, which he stated was mere matter of decoration. By these alterations, he alleged that the main wall, except to the extent already mentioned, would remain untouched. In the interior of the house he proposed to remove one of the partition walls, which, he stated, was not a bearing one, nor under that in the floor immediately above; and he intended to place iron pillars both in the sunk and street flats, immediately under the partition wall in the floor above, and to put additional supports by means of beams.

These alterations were resisted by Misses Gray, the proprietors of the flat immediately above, on the ground, 1. That their property would thereby be deteriorated, both in point of comfort and pecuniary value; and, 2. That they would be attended with danger. The Dean of Guild, after remitting to the trades members of council, and Messrs. Hamilton and Smith, who reported that the alterations 'can be executed without any reasonable apprehension of danger to the superincumbent parts of the building,' granted the prayer of Greig's petition. Misses Gray then pre-

sented a bill of advocacy, which was refused by Lord Eldin, under the qualification that Greig should find caution de damnis. A second bill having been presented, Lord Hermand passed it. But the Court, after remitting to Mr. Burn, architect, and Mr. Paton, builder, who reported that the alterations could 'be executed with perfect safety, and without any apparent risk, or any reasonable apprehension of danger to the building above,' altered, and refused the bill.

*Advocators' Authorities*.—Hall, Dec. 14. 1698, (12775); Ferguson, Nov. 12. 1816, (F. C.); Birnie, June 5. 1819.

*Respondents' Authorities*.—Robertson, March 3. 1784, (14584); Denniston, March 10. 1824, (ante, Vol. II. No. 725.)

CUNINGHAM and BELL, W. S.—GREIG and PEDDIE, W. S.—Agents.

C. STEIN and Others, Pursuers.—*Coventry*.

No. 87.

W. SANDS and Others, Defenders.—*Dundas*.

*Quinquennial Prescription*.—Stat. 1685, c. 14. — Held that an action of reduction founded on a holograph missive, which had been asleep for five years, was not affected by the quinquennial prescription.

WILLIAM SANDS, after having sold a property, by a holograph missive, to Stein and others, and received payment of the price, disposed it to his son Peter. In 1818, Stein and others, founding on the missive, brought an action of reduction, declarator, and damages, against these parties. This process fell asleep, and, after the lapse of six years, (during which time Peter died,) a summons of wakening and transference was raised and executed. Against this it was objected, that the action was prescribed, in terms of the statute 1685, c. 14; but the Lord Ordinary found 'that the quinquennial prescription does not apply to this process,' and found the defenders liable in expenses. The Court refused a petition, without answers, as to the plea of prescription; and afterwards adhered as to expenses.

June 18. 1825.

1st Division.

Lord Eldin.

D.

R. WILSON,—J. TAYLOR,—Agents.

No. 88. W. KERR, Petitioner.—*Fullerton—Brown—Paterson.*  
A. ALLAN and COMPANY, Respondents.—*Moncreiff—*  
*D. Macfarlane.*

*Bankrupt—Discharge.*—Circumstances in which a discharge to a bankrupt was opposed on the ground of fraud, but granted, no relevant charge being specified.

June 18. 1825.

2d Division.

F.

THIS was an application on the part of Kerr, a sequestrated bankrupt, for a discharge, which was opposed by Allan and Company, creditors on his estate, who alleged that the greater part of his debts was incurred while he knew his affairs to be irretrievable, and that he made use of improper means to maintain his credit. The Court allowed them to give in a condescendence of their allegations; but as none of the averments inferred a charge of fraud on the part of Kerr, although their Lordships conceived he had perhaps been over sanguine in regard to his affairs, they granted the prayer of his petition.

T. DARLING,—A. ALLAN, W. S.—Agents.

No. 89.

A. ROBB, Advocate.—*More—A. M'Neill.*

KINNEAR'S TRUSTEES, Respondents.—*Moncreiff—Jameson.*

*Factor—Commission.*—A merchant employed as an agent to sell a mill, not entitled to charge a higher commission than that of a regular agent or writer.

June 21. 1825.

2d Division.

Lord Mac-  
kenzie.  
M'K.

THE late Mr. Kinnear employed Robb, a merchant in Dundee, to sell a mill belonging to him in that town. Robb, having effected a sale, retained, in accounting with Kinnear, £68. 10s. as commission, being  $2\frac{1}{4}$  per cent. on the price of the mill, and 5 per cent. on the price of a small quantity of machinery contained in it. Kinnear thereupon brought an action before the Magistrates of Dundee, concluding for the balance over and above £15. 10s., which he alleged was a sufficient commission. The Magistrates found Robb entitled to £25, and gave decree for the balance. Robb having brought an advocacy, the Lord Ordinary remitted to a writer in Dundee to report as to the charge which a writer or other agent would have made for selling the property; and on receiving a report that, including all expenses, a writer could only have charged £15. 10s., agreeably to fixed rates established in Dundee, his Lordship remitted simpliciter, and the Court unanimously adhered.

R. KENNEDY, W. S.—W. MURRAY, W. S.—Agents.

R. PETERS and Others, Pursuers.—*Skene.*J. MARTIN, Defender.—*Rutherford.*

No. 90.

*Jurisdiction.*—An executor of an English will, relating solely to English property, being resident in Scotland, may be sued for implement in the Court of Session.

MARTIN, originally a native of Scotland, was sole surviving executor and trustee under the will of the late Bertie Entwizle, by which were conveyed to him considerable estates in England, and personal property, directed to be invested partly in Government funds and partly in English estates, and settled on certain persons, under particular destinations, after the lapse of 20 years; together with plantations in the West Indies, to be managed during this period by the trustees. Martin, after the lapse of the 20 years, having come to reside in Scotland, Peters and others, who had an interest under the will, raised an action of count and reckoning, concluding for implement of the will and payment of the balance in Martin's hands, not vested in Government stock, according to the directions of the will relative to personal property. Martin admitted that he had a balance of £7800 in his hands, but objected to the jurisdiction of the Court, on the ground that the accounting being solely relative to an English trust, and property situated in England, or in colonies subject to the English law, the implement of the will could only be judged of in an English Court, in which alone he could get a discharge. To this it was answered, that Martin was subject to the jurisdiction of this Court, and that, while he resided in Scotland, no orders of an English Court could be enforced against him. The Lord Ordinary sustained the jurisdiction of the Court, and ordained Martin, 'within 15 days, to produce evidence that he had invested in the public funds £7000 of the admitted balance in his hands, and appointed the pursuers to put in a condescence of what they further claimed to be done in implement of the will.' Martin petitioned against this interlocutor; but the Court having adhered, he reclaimed, and stated that he had filed a bill in Chancery relative to this matter. The Court superseded the cause, to see if any steps were taken in consequence of this; and it appearing that no effectual procedure had followed, and that no order of the Court of Chancery could be enforced against him while in Scotland, they again adhered, reserving to him to be heard on an allegation made at the last advising, that he had put himself within the jurisdiction of the Court of Chancery.

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Lord Mac-  
kenzie.

F.

Their Lordships, while satisfied that the case ought, as a matter of expediency, to be settled in an English Court, held that they could not deprive the pursuers of their legal right to sue a party domiciled within their jurisdiction, and to obtain security for the balance in his hands.

*Pursuers' Authorities.*—Morrison, Feb. 25. 1790, (4601); Scott, Dec. 9. 1797, (4845.)

*Defender's Authorities.*—Dryden, March 1684, (4844); Burroughs, July 11. 1754, (2661); M'Kenzie, Aug. 4. 1744; Douglas, Heron, and Co. Nov. 19. 1793, (4602.)

No. 91.

MARY BROWN, Pursuer.—*Moncreiff—Christison.*

TRUSTEES of the late JOHN BROWN, Defenders.—*Cockburn—Maitland.*

June 23. 1825.

1ST DIVISION.

Lords Alloway  
and Eldin.

H.

THIS case was connected with and depended on the one noticed ante, Vol. IV. No. 35, (which see.) The pursuer had brought an action of count and reckoning against the defenders, on the assumption that certain sums specified in a testament made by her brother William Brown, who died in America, belonged to her. This was resisted by the defenders, who alleged that she had no title, and that the fee belonged to them. The Lord Ordinary sustained her title; and the Second Division having reduced that on which the defenders founded, and sustained hers, the Court adhered.

W. FERGUSON, W. S.—E. M'BRAIN, W. S.—Agents.

No. 92.

D. RAMSAY, W. S. (Assignee of Mrs. SCOTT,) Claimant.—*Shaw.*

A. GOLDIE, W. S. Common Agent in the Ranking of Parton,  
Respondent.—*Whigham.*

*Heritable or Movable.—Husband and Wife.*—Circumstances in which a bond having a clause of interest was held heritable in a question between husband and wife.

June 23. 1825.

1ST DIVISION.

Lord Eldin.

S.

MRS. GLENDONWYN, proprietrix of Crogo, disposed the estate to her husband, 'declaring that the said William Glendonwyn and his foresaids, by his or their acceptance of these presents, shall become liable in payment of all debts payable by me at the time of my decease, and of the provisions settled or to be settled by me upon my children.' The obligation to infest was 'subject to the reservation and declaration above written;' and assine was taken accordingly. Immediately thereafter Mrs. Glendonwyn, with consent of her husband, executed a bond of provi-



sion in favour of her three daughters, 'in exercise of the power reserved to me in a late disposition executed by me of my estate of Crogo, to and in favour of the said William Glendonwyn.' By that deed she gave to each of her daughters a certain sum, payable 'within twelve months next after the longest liver of us two, me or my said husband their father, with a fifth part of the principal sum of liquidate penalty in case of failure; together also with the due and ordinary annual rent of the said principal sum to each respectively, from and after the time of the decease of the longest liver of us two, me or my said husband, to the foresaid time of payment, and yearly, termly, and proportionally thereafter until payment.' A power to alter was reserved; and it was declared that during the life of their parents the daughters should have no right to assign, and that, in the event of the decease of any of them, the share should belong to the survivors. During the life of her parents, one of the daughters, Ismene Magdalene, married Mr. Scott, to whom Mr. Glendonwyn afterwards sold his estates of Parton and Crogo, subject to the burden of the price. After the death of Mr. and Mrs. Glendonwyn, the bond remained unuplifted, and began to bear interest; and Mr. Scott having been unable to pay the price, a ranking and sale of the estates was brought. The bond was then assigned to Mr. Ramsay, who claimed to be ranked in virtue of it. To this it was objected by the common agent, that the bond had been transferred, *jure mariti*, to Mr. Scott, seeing that, at the period of the marriage, the term of payment had not arrived, and the bond had not begun to bear interest, and therefore any claim on the price of the estate was extinguished by compensation. In answer to this, Mr. Ramsay pleaded, 1. That, in a question between husband and wife, the bond was heritable, because the term of payment had elapsed, and it was now bearing interest; that the period for judging whether it was possessed of that quality, was not that of the solemnization of the marriage, but that of its dissolution; and therefore, as it must necessarily bear interest at that time, it did not fall under the *jus mariti*. 2. That, independently, the bond was, from the other clauses which it contained, of an heritable character, and that it was the evident intention of the granter that it should be so. The Lord Ordinary repelled the objections, and the Court, on advising a petition and answers, adhered.

On moving the petition for the common agent, two of the Judges expressed a doubt whether it was necessary, in order to characterize a bond as heritable in a question between husband and wife, that

the term of payment should have elapsed; and they rather thought that the clause of interest was sufficient. At the advising, however, the Judges, without adverting to this point, were of opinion that, from the various clauses of the bond, it must be held to be heritable.

*Claimant's Authorities.*—(1.)—Hope's Min. Prac. p. 159. 161; 1641, c. 57; 1661, c. 32; 2. Stair, 8. 47; 3. Bank. 8. 12; 2. Ersk. 2. 18; Lothian, Nov. 14. 1816, (F. C.)—(2.)—Gray, July 4. 1666, (3629); 2. Stair, 1. 4; 2. Ersk. 2. 9.

*Respondent's Authorities.*—Nicolson, June 16. 1527, (5798); 2. Mack. 2; 2. Stair, 1. 4; 2. Stair, 4. 24; 2. Ersk. 2. 9. and 10; Dick, June 26. 1668, (3629); Mease, Nov. 22. 1748, (5506); Corrie, Feb. 27. 1765, (5772.)

D. RAMSAY, W. S.—A. GOLDIE, W. S.—Agents.

No. 93. Mrs. BUSHBY and Others, Claimants.—*Dean of F. Cranstoun—Jameson.*

W. RENNY, W. S. Common Agent in the Ranking of Kirkmichael, Respondent.—*Jeffrey—Christison.*

*Writ—Rei Interventus—Provision to Children—Jus Crediti, or Spes Successionis.*—

1.—Whether a contract of marriage executed in the Scottish form in England, and consisting of three sheets, but signed on the last page only, be probative.—2.—Whether the objection is removed by the marriage having taken place on the faith of it.—3.—Whether a provision to children by a conveyance to trustees confers a jus crediti, or only a spes successionis.

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Lord Eldon.

S.

By a contract of marriage drawn in the Scottish form, but executed in England, between Mr. Bushby of Kirkmichael and his intended spouse, Miss Maria Camac, it was stated in the narrative, that 'in consideration of the fortune after mentioned, the said William Bushby hath engaged to settle and secure upon his lands and estate after mentioned, in manner and under the conditions underwritten, the sum of £10,000 of lawful money of Great Britain, the yearly interest of which shall be received and enjoyed by the said Miss Maria Camac, in case she survive him, during all the days of her lifetime thereafter, and that said sum itself shall belong to the children, one or more, to be procreated of the said intended marriage, if any there be, and the lawful issues of their bodies, after the death of the said William Bushby and Maria Camac, and the longest liver of them; but subject always to such division as the said William Bushby shall make, in manner after mentioned.' He therefore bound himself, 'in case the said Maria Camac shall survive him, to pay to her, &c. a jointure or annuity of £500 money foresaid, being the lawful interest of the said sum of £10,000, and that yearly and every year during all the days of her lifetime, paying the

‘first year’s annuity within ten days after the death of the said William Bushby, and thereafter at two terms in the year,’ &c. And also to pay unto the children, one or more, that shall be procreated of the said intended marriage, or to the lawful issue of their bodies, the said sum of £10,000 money foreshaid, to be divided amongst them in such proportions as the said William Bushby shall appoint,’ &c. ‘and that at the first term of Whitsunday and Martinmas that shall happen after the death of the longest liver of the said William Bushby and Maria Camac, with one fifth part more of liquidate expenses and penalty in case of failure in due payment, and together with the lawful interest of the said sum of £10,000 money foreshaid, from and after the said term of payment, until full payment of the same : Declaring always, as it is hereby specially provided and declared, that in case any of the said children shall die during the lifetime of the said William Bushby or Maria Camac, and leave lawful issue of their body, that such issue surviving the longest liver of the said William Bushby and Maria Camac shall have right to the part of the said sum of £10,000 money foreshaid, penalty and interest, that would have belonged to the deceased parent.’ He then bound himself to ‘infeft and seise the said Maria Camac for her own right and interest, and for securing to her the said jointure or annuity ;’ and certain persons, ‘and the survivors or survivor of them, and the heirs of the survivor, as trustees for the children, one or more, to be procreated of the said marriage, for securing unto them the said sum of £10,000 money foreshaid, in all and whole the ten merk land of Kirkmichael,’ &c. In execution of this obligation, he gave a procuratory of resignation and precept of sasine ; but it was declared that during his life he should be entitled to redeem the heritable security over Kirkmichael, upon his paying to the trustees the £10,000, to be lent out on new security ; and which sum was to be held by them in trust for payment to him of the interest during his life, and after his death to his wife, and on her death to pay to the children the principal sum ; and failing children, in trust for him and his heirs. In consideration of these provisions, he received £3500, and the marriage was contracted. This deed consisted of three separate sheets of paper, but the last page of the third sheet was the only one which was signed. It was delivered to one of the trustees ; and some time thereafter the defect being discovered, Mr. Bushby granted a bond of corroboration in precisely the same terms as the original deed, and infeftment was taken upon the lands of Kirkmichael. At this time it

was alleged that Mr. Bushby was perfectly solvent ; but thereafter having become bankrupt, a process of ranking and sale of his estates was brought. Mrs. Bushby having claimed to be ranked for the amount of her jointure, and the trustees for the £10,000 payable to the children, it was objected by the common agent,—1. That as the original contract of marriage was informal and improbativ, it could not be regarded to any effect whatever ; and therefore, as the claim of Mrs. Bushby must rest on the bond of corroboration, which was a postnuptial contract, her claim must be limited to that which was reasonable and proper in the circumstances of her husband.—2. That, even on the supposition of the original deed being effectual, the children had no *jus crediti*, but merely a *spea successiois*, because the obligation was in favour of children *nascituri* ;—and, 3. That as a bond for £5000 had been granted by Mr. Bushby to one of his daughters on her marriage, this must be presumed to have been taken from the £10,000, and that the ranking must be limited accordingly. To this it was answered,—1. That the original contract of marriage was validly executed according to the law of England ; that it was rendered effectual by the marriage having taken place on the faith of it ; that, on the sheet which was signed, the obligation was sufficiently announced ; and that, therefore, the subsequent bond of corroboration was merely in implement of a prior obligation.—2. That the children had a *jus crediti*, because the father had not only bound himself to pay the £10,000 to trustees, but had actually divested himself of his estate to that extent in their favour, and rendered himself liable to diligence at their instance ;—and, 3. That it appeared from the terms of the bond for £5000, that it was intended to be independent of the sum of £10,000, which could not thereby be affected. The Lord Ordinary sustained the claims, and the Court adhered.

LORD HERMAND observed—That the presumption of the fee being in the father was redargued by the conveyance to trustees, and by the security which was given to them in implement of the obligation ; and that it was perfectly clear that it was the intention of the parties that the fee of the £10,000 should belong to the children.

The other Judges concurred.

*Claimants' Authorities.*—(2.)—*Marjoribanks*, Feb. 1682, (12891) ; *Mackenzie*, Feb. 2. 1792, (*Bell's Cases*, 404) ; *Gibson*, Feb. 4. 1726, (12885.)

*Respondents' Authorities.*—(2.)—*M'Tavish*, Nov. 15. 1787, (12922) ; *Gordon*, June 3. 1748, (12915) ; *Ballingall*, Jan. 21. 1759, (12919) ; *Nasmyth*, Jan. 20. 1791, (12914) ; 1. *Bell*, 553, 554 ; *Earl of Wemyss*, Feb. 28. 1815, (F. C.) ; *Brown*, Jan. 27. 1820, (1. *Bell*, 553, note.)

INGLIS and WEIR, W. S.—W. RENNY, W. S.—Agents.

W. INGLIS, W. S. and INGLIS and WEIR, W. S. Claimants.—

No. 94.

*Dean of F. Cranstoun—Jameson.*

W. BUSHBY, W. S. Common Agent in the Ranking of Kirk-michael, Respondent.—*Jeffrey—Christison.*

*Penalty—Heritable Creditor—Writer's Hypothec.—Held, —1.—That a cautioner paying interest to the creditor, and obtaining an assignation to the creditor's security, is entitled to rank on the principal debtor's estate, in virtue of the penalty for interest on the interest so paid, and the expenses of the assignation;—and, —2.—That an agent employed to borrow money has a hypothec over his client's title-deeds for the account paid by him to the lender's agent.*

MR. BUSHBY having borrowed two sums of money on heritable security from two different persons, Mr. Inglis became bound for the regular payment of the interest. On the insolvency of Mr. Bushby, Mr. Inglis was obliged to pay the interest to the creditors, and he obtained from them assignations to their securities to that extent. The firm of Inglis and Weir had acted as agents generally for Mr. Bushby, and in that character they had been employed to raise money for him. They accordingly did so, and paid to the agents of the lenders the accounts which were due to them for making out the securities relative to the sums which were lent. Mr. Inglis having claimed, in the ranking and sale of Mr. Bushby's estates, to be ranked as an heritable creditor, not merely for the interest which he had paid to the creditors, but also for the interest on these advances, and for the expenses of the assignations to him, in virtue of the penalties;—and Inglis and Weir having claimed to be ranked preferably, under their right of hypothec over the title-deeds which were in their possession, for the above disbursements, the common agent objected, 1. That Mr. Inglis, as assignee of the creditors, and as representing them, could claim nothing more than the interest which he had paid, and that the penalty did not cover interest upon that interest, nor the expenses of the assignation; and, 2. That Inglis and Weir could not claim a preference, in virtue of their hypothec, for money paid to other agents; because this was an ordinary loan of so much money to Mr. Bushby, seeing that it was the practice for the agent of the lender to deduct the amount of his account from the sum lent, and to pay the balance to the borrower; so that Inglis and Weir, by adding the sum thus retained to the amount lent to Mr. Bushby, and paying the full sum, just made an ordinary loan to him. To this it was answered, 1. That the interest paid by Mr. Inglis was, quoad him, a principal sum,—and that

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the interest thereon, and the expenses of the assignation, being loss actually sustained by him, were covered by the penalty; and, 2. That the payments made by Inglis and Weir were part of the ordinary disbursements of a law agent:—that although there were such a practice as that alleged by the common agent, yet the agent of the borrower always paid the full sum to his client, so that, in truth, he paid the account of the agent of the lender; and as that agent had a right of hypothec, he transferred it on receiving payment, and delivering up the title-deeds. The Lord Ordinary found, 1. ‘That Mr. Inglis is entitled to rank upon the penalty in the heritable security for the interest on his advances, and also the expense of the conveyances;’ and, 2. he sustained the claim of preference by Inglis and Weir. To this interlocutor the Court adhered.

**LORD BALGRAY.**—There is some doubt as to the claim of Mr. Inglis to be ranked for interest on interest. The cedent could not do so, and consequently neither can the assignee; and although, where there is an adjudication, the Court, on equitable principles, allows the creditor indemnification under the penalty for his actual expenses, yet no example has hitherto occurred of interest upon interest being covered in this manner. With regard to the claim of Inglis and Weir, there is no doubt, because, independently of every other circumstance, they purchased the hypothec which belonged to the agent of the lender.

**LORD HERMANN.**—Mr. Inglis paid the interest as a cautioner, which thereby became, quoad him, a principal sum. He was therefore entitled to interest upon that advance, and the penalty is sufficient to enable him to obtain this indemnification.

**LORD PRESIDENT.**—In strict law, a creditor is bound to pay both interest and penalty; but this is limited on equitable principles. The Court will not allow a creditor to take interest upon interest, which he has neglected to recover, because it was his duty to have done diligence; but where another—as, for example, a cautioner—is called on to pay, he is entitled to interest upon his advances. The penalty is not allowed to be exacted to the full extent, but is restricted to the loss actually sustained by the failure of the debtor. The claim by Inglis and Weir is perfectly good on the principle laid down by Lord Balgray; but, besides, the advance was one of the usual disbursements made by an agent.

**LORD CRAIGIE.**—The penalties, it is true, are legally due, but they are always limited to the effect of giving indemnification. Mr. Inglis is entitled to simple interest on the sums which he paid.

*Claimants' Authorities.*—(1.)—*Sampla*, Nov. 29. 1822, (10033); 1. Bell, 567; 4. Stair, 2. 2—(2.)—*Aden*, Nov. 27. 1705, (6710); 2. Bell, 117.

*Respondents' Authorities.*—(1.)—1. Bell, 567; Allan, Dec. 23. 1757, (10047); Gordon, Nov. 27. 1761, (10050).—(2.)—Grant, Feb. 23. 1801, (No. 1. App. Hyp.); Skinner, May 21. 1822, (ante, Vol. II. No. 238.)

INGLIS and WEIR, W. S.—W. BENNY, W. S.—Agents.

R. and A. CARSEWELL, Pursuers.—*Moncreiff*—*Cuninghame*.

No. 95.

P. G. M'ARTHUR and J. GORDON, Defenders.—*Skene*.

*Compensation.*—1.—Whether trustees for behoof of two sets of creditors in separate deeds are to be held as one and the same;—and,—2.—If so, whether one of a number of creditors for whose behoof the trust was granted, being debtor to the trustees, is entitled to plead compensation on the share of his debt proportioned to his claim against the trustee.

MUNN residing in Canada, and Hunter residing in this country, were partners in a shipbuilding concern which expired in 1816, when a submission was entered into as to a claim of £6000 alleged by Hunter to be due him by Munn on a settlement of accounts. During the dependence of this submission, a ship (the Duke of Richmond) belonging to Munn arrived in this country; and to save expense in attaching her by separate diligences, several of Munn's creditors in this country, whose claims amounted to about £4000, agreed, together with Hunter, to have her sold for their joint behoof, it being stipulated that a share of the price, proportioned to Hunter's claim, should be deposited in a bank, in the names of the arbiters, to await the issue of the submission. Instead of following this plan, Munn, who had in the mean time come to this country, was prevailed on to grant a vendition of the vessel to M'Arthur and Gordon, and his own brother, as trustees for behoof of certain creditors named in the deed, not including Hunter; and by these persons the vessel was sold. After some discussion, they agreed to admit Hunter to the benefit of this trust; and Montgomery, their agent, wrote Hunter that he had deposited in a bank the price in the name of the trustees, and stating 'that he would hold the promissory note till the 'scheme of division is adjusted among the parties.' An award was ultimately pronounced in Hunter's favour for the full claim of £6000. In the mean time another vessel (the Prompt,) which was the property of the concern of Munn and Hunter, had been sent to this country; and as it had been agreed in the submission that the company property should be placed at the disposal of the arbiters, the certificate of registry of the Prompt was lodged

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Lord Mac-  
kenzie.  
M'K.

in the submission. This, however, was borrowed up from the clerk, and a vendition was obtained from Munn of his half share in favour of Gordon and M'Arthur, and one Jarvie, in trust for certain of his creditors, excluding Hunter and his own brother, and including certain others not mentioned in the trust-conveyance of the Duke of Richmond. This half share, Hunter, along with a friend, purchased from the trustees, and granted bills for the price; and he subsequently assigned his claim of £6000, and corresponding share of the price of the Duke of Richmond, to B. and A. Carsewell, who raised an action against the trustees in the first deed for payment. In defence they pleaded, That as trustees generally for behoof of Munn's creditors under both deeds, they were entitled to plead compensation on the bills granted by Hunter, (who was now bankrupt,) for the half share of the Prompt. To this it was answered, 1. That the trustees in the two deeds were different, as were also the sets of creditors for whose behoof they were granted. 2. That if the trusts were to be considered the same so as to admit a concours, then Hunter and his assignees were entitled, as creditors, to a large proportion of the price of the half of the Prompt, which at least formed a good claim of compensation. 3. That the sum in dispute was in truth a deposit, which the trustees were not entitled to retain on a plea of compensation; and, 4. That, at any rate, they had drawn from Hunter and other co-obligants payment of the price of the Prompt. The Lord Ordinary found, 'That the pursuers, as assignees, can be in no better situation than the assigner was at the date of the assignation; that the assignee Robert Hunter could not have prevailed in this action while he refused to pay the price of the ship Prompt,' and assolizied the trustees.—The Court adhered to this interlocutor, 'in so far as it is thereby found that the pursuers, as assignees, can be in no better situation than the cedent was in at the date of the assignation; but recall the same quoad ultra, and remit to the Lord Ordinary to hear parties on the questions, whether the respondents are bound to impute in part payment of their claim any sums recovered by them, whether from Hunter's bankrupt estate or that of his co-obligant Brown, or from the insurance on the Prompt or other sources, and generally on the state of accounts between the parties to do as he shall see cause, reserving entire all questions of expenses hinc inde.'

W. YOUNG, W. S.—J. DUNLOP, W. S.—Agents.



ANDREW BOOG, Pursuer.—*Forsyth*.  
R. JAMIESON, W. S. Defender.—*Pyper*.

No. 96.

*Cautioner*.—A cautioner for payment of rent, holding a letter of relief, entitled to enforce it, although it was alleged he had not intimated that the effects of the tenant had been sequestrated for part of the rent.

MILLIGAN having obtained the lease of a shop from Whitsunday 1823 to Whitsunday 1824 at a rent of £40, and Boog having become cautioner for payment of it, Jamieson, on the 10th July 1823, granted him the following obligation: 'Whereas you have become security for the current rent of Mr. Andrew Milligan's shop to the extent of £40 sterling, I hereby, in the event of your being called upon for the same, agree, and bind and oblige myself, to free and relieve you thereof.' At Martinmas Milligan was unable to pay the half year's rent then due, and the landlord sequestrated and sold his effects to that extent. He also failed to pay the rent at Whitsunday, and Boog having been required by the landlord to pay it, he called upon Jamieson to relieve him, in terms of his obligation. This was resisted on the grounds, 1. That Boog had not intimated the sequestration at Martinmas, and that thereby he had lost his recourse; 2. That he had not discussed Milligan; and, 3. That he could not allege that he had actually paid the debt. To this it was answered, 1. That the sequestration was the act of the landlord, and was beneficial to all concerned; that no demand had been made on him for payment; and that even although he had been aware of the sequestration, he was not bound to intimate it: 2. That Milligan was bankrupt, and had fled the country; and, 3. That the landlord had threatened an action on the cautionary obligation. Boog having raised a process of relief, the Lord Ordinary assailed Jamieson. But the Court unanimously altered, and decerned in terms of the libel.

June 25, 1825.

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Lord Meadowbank.  
H.

*Pursuer's Authority*.—3. Ersk. 2. 65.

*Defender's Authority*.—2. Ersk. 2. 66.

SCOTT and BOOG, W. S.—R. JAMIESON, W. S.—Agents.

No. 97.

J. BARR, Pursuer.

Mrs. STRUTHERS and Others, (M'LILWHAM's Trustees,) De-  
fenders.—*Cuninghame*.

June 25. 1825.

1st Division.

Lord Alloway.

S.

THIS was a branch of the case noticed ante, Vol. I. No. 158,  
and depended upon the report of an accountant. The Lord Or-  
dinary decerned in terms of his report, and the Court refused a  
petition without answers.

J. R. STODDART, W. S.—D. FISHER,—Agents.

No. 98.

JAMES HERON, Advocate.—*Cuninghame*.Honourable R. ROLLO, Respondent.—*Shaw*.

*Landlord and Tenant—Process.*—Held,—1.—That a tenant having, towards the ter-  
mination of his lease, bound himself to remove without warning, cannot object  
that warning has not been given;—and,—2.—That a petition against an interlocutor  
of the Ordinary on the Bills, and one by an Ordinary of the First Division, cannot  
be presented to the Second.

June 28. 1825.

1st Division.

Bill-Chamber.

Lords Craigie

and Medwyn.

S.

HERON held a sub tack from Mr. Rollo, which expired, as to  
the arable lands, at Martinmas 1824,—and at Whitsunday 1825,  
as to the houses and grass. Having run in arrear of rents, Mr.  
Rollo executed a sequestration of his effects; and on the 11th of  
November 1824 Heron addressed a letter to him, acknowledging  
the amount of the debt, authorizing him to sell off the effects,  
and granting the following obligation: 'I also agree and become  
' bound, without any warning whatever, to remove from the  
' arable and grass land, houses, yards, and whole premises of the  
' said farm of Wood, and to leave the same completely void and  
' redd, at the term of Candlemas next, so that you, or those au-  
' thorized by you, may then enter thereto, and possess the same  
' at pleasure.' The effects were accordingly sold; and on the 1st  
of January 1825 Mr. Rollo presented a petition to the Sheriff  
of Ayrshire, founding upon the letter, and praying for warrant  
to eject Heron at Candlemas. In defence Heron pleaded, 1.  
That he had not received warning to remove, and the letter was  
gratuitous, and not binding; and, 2. That a prolongation of his  
sublease for twelve years had been promised. The Sheriff, after  
allowing Heron to prove the latter allegation by oath, (which he  
failed to do,) granted warrant of ejection. Heron then presented  
a bill of advocacy, which Lord Medwyn refused, and subjoined

this note: 'It is impossible to figure one case so like another as the present and *Brown v. Peacock*, 27th <sup>February</sup> December 1822, are. Moreover, the allegation on which the defence on the merits is founded was quite susceptible of proof, if true; and the Sheriff's interlocutor accordingly allowed such proof.' Lord Craigie having refused a second bill, Heron reclaimed to the Second Division against both these interlocutors. But the Court, holding that they had no power to review the judgment of Lord Craigie, remitted the case to the First Division; and their Lordships, on advising a reference to oath, refused the petition without answers.

*Respondent's Authority.*—Brown, Feb. 27. 1822, (ante, Vol. I. No. 405.)

R. DUNLOP, W. S.—H. COWAN, W. S.—Agents.

JOHN PEARSON and Others.—*Whigham*.

JOHN CORRIE and Others.—*Marshall*.

Competing.

No. 99.

*Testament.*—Held that a bequest made to the 'lawful heirs of E. P.' meant those alive at the death of the testator.

THE late William Boyle, who resided at Port of Spain in Trinidad, executed a testament there in the English form, and afterwards died at Liverpool. By that deed he bequeathed, inter alia, 'to my sister Helen, now or late of Pentpont in the county of Dumfries, the sum of £1000 sterling money for her use during her lifetime; £800 sterling of which, at her death, to revert to the lawful heirs of my sister Elizabeth, now or late of Pentpont aforesaid.' After making some additional legacies, he bequeathed 'the whole of the residue of my property in Great Britain, the West Indies, or elsewhere, to the lawful heirs of my sister Elizabeth before mentioned, share and share alike.' He then nominated executors; and concluded by stating, that 'it is my desire and earnest request that the business should be brought to as speedy a close as possible, without prejudice to either party.' After the executors had paid all the legacies, a question arose relative to the disposal of the sums left to 'the lawful heirs' of Elizabeth. She had married one Pearson, by whom she had a family; and one of her daughters had married James Corrie, who also had a family. John Pearson and others were the children of Elizabeth, and were all alive at the death of the testator; and Corrie and others were the children of Eliza-

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1st DIVISION.  
Lord Meadowbank.  
H.

beth's daughter. By Corrie &c. it was alleged that the executors were not entitled to pay the money till the death of Elizabeth, because it could not be known until that period who would be the lawful heirs, seeing that all her own children might die before her, and therefore they (via. Corrie and others) would be her lawful heirs. To this it was answered, that it was the evident intention, both from the will and from the letters of the testator, that he intended to bequeath the money to the children of Elizabeth who were alive at his own death; and that this was confirmed by the circumstance of having made no trust, but appointed his executors to bring matters to a close as speedily as possible. The executors having brought a multipointing to settle this question, the Court, on the report of the Lord Ordinary, found, 'That by the will of the deceased William Boyle, the children of his sister Elizabeth who were alive at the period of the testator's death, are entitled, under the description of 'the lawful heirs of my sister Elizabeth,' to the whole residue of the testator's means and estate,—and that they are also entitled, under the same description, to the sum of £800, part of the capital sum of £1000, of which the interest is appointed to be paid to the testator's sister Helen Boyle, under deduction of legacy duty, and that at the death of the said Helen Boyle: That the claimants, John Pearson &c., as the only children, alive at the testator's death, of his sister Elizabeth, have right to the said residue, and likewise to the said sum of £800,—and ranked and preferred them accordingly.

*Pearson's Authorities*.—Ambler, 273; 5. Ves. jun. 403; 14. Ves. jun. 490; 3. Emk. 9. 14. *Corrie's Authority*.—Preston on Legacies, 209.

MACKENZIE and SHARPE, W. S.—D. and A. THOMSON, W. S.—  
Agents.

No. 100. W. PARLANE and Others, Complainers.—*Moncreiff*—*Jamison*.  
J. WATSON, Respondent.—*Cockburn*—*M'Neil*.

*Sequestration—Trustee*.—1. Trustee removed for deviation from the statute, particularly § 46.—2. Held competent for creditors, though contingent, to apply for removal of a trustee under that section.

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F.

THE estate of Smellie was sequestrated, and Watson appointed trustee on it, in 1821; and in 1824, no dividend having been declared, Parlane and other creditors presented a petition and complaint, founding on § 46 of the bankrupt act, and praying

for his removal, on the ground that he had improperly delayed to realize the funds of the estate—that he had not made regular states, nor lodged the sederunt-book, in terms of the statute—that after having converted part of the estate into money, he did not declare a dividend, but took credit to himself (with permission of the commissioners, but before his accounts were audited) for a large sum as commission, and gave the bankrupt an aliment without the sanction of the creditors—that he had not lodged all the funds in his hands in a bank—and that, since the presenting of the petition, he had fraudulently abstracted from the bank, and attempted to embezzle all the funds he had ever lodged. To this complaint it was objected in point of form, 1. That it was competent only at the instance of a fourth part of the creditors, but the complainers did not amount to that proportion, and were chiefly contingent creditors;—and on the merits, 2. That from the complicated nature of the estate, the many false claims that had been lodged, and the difficulty of detecting and clearing them, it was impossible to adhere strictly to the terms of the bankrupt act. But the Court, being satisfied that the charges were well founded, and disregarding the objection in point of form, sustained the complaint, removed the trustee, ordained him to account for his intrusions, found him liable in penal interest for all sums improperly retained in his hands, and appointed a day for the election of a new trustee.

The Court were agreed, that although a complaint for removal on general grounds, under § 71 of the bankrupt act, required the concurrence of a fourth part of the creditors; yet that any creditor, even contingent, was entitled to apply for removal on the special grounds contained in § 46.

J. BISSET,—J. HAMILTON, W. S.—Agents.

W. PARLANE and Others, Complainers.—*Moncreiff—Jameson.* No. 101.  
A. TEMPLETON and Others, Respondents.—*Sol-Gen. Hope—  
G. Napier.*

*Sequestration—Commissioners.*—Held incompetent to apply simply for removal of commissioners, and without libelling the section of the statute founded on.

THE complaint mentioned in the preceding case prayed also for the removal of Templeton and others, the commissioners on Smellie's estate, on the ground that they had neglected their duty, in not checking the improper conduct of the trustee, and

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in allowing him to take credit for the large commission, before any dividend had been declared, or his accounts audited; and it further concluded to have them found liable for the loss arising from their neglect. This application was met by the objection, that § 71 of the act, which alone authorized any complaint against commissioners, was not founded on by the complainers; and that it did not authorize an application for the removal of the commissioners, but only for calling them to account for their conduct, as to which there was no conclusion in the complaint. The Court dismissed the complaint as incompetent quoad the commissioners, reserving all claims against them in a competent process.

*Respondents' Authorities.*—Megget, March 1, 1823, (ante, Vol. II. No. 238); 2. Bell, 415-17.

J. BISSET,—G. and W. NAPIER, W. S.—Agents.

No. 102.

G. BINNIE, Advocate.—*Brown.*

W. PARLANE, Respondent.—*More.*

*Relief—Reparation.*—A proprietor of a house which was in the course of building, having been found liable in damages for an injury suffered by a woman in consequence of an insufficient fence, held entitled to relief from the builder, in terms of a contract.

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Lord Cringletie.

F.

PARLANE having been found liable in damages to a woman who had fallen into the sunk story of a house belonging to him, in the course of building, (see ante, Vol. III. No. 394,) brought an action of relief against Binnie, the contracting tradesman, who had bound himself to rail in the 'found' properly, agreeably to the police act of Glasgow. Binnie pleaded in defence, that by this clause he was bound to maintain a fence only till the walls were above the level of the street; that he had done so, and offered to prove that this was the understanding and practice of tradesmen as to such obligations. The Sheriff of Lanarkshire refused to allow this proof, and decerned in relief; and the Lord Ordinary and the Court refused a bill of advocacy.

T. DARLING,—W. and A. G. ELLIS, W. S.—Agents.

DAVID CAMPBELL.—*Rutherford.*JAMES WATSON.—*Maitland.*

No. 103.

Competing.

*Bankrupt—Sequestration—Trustee.*—An allegation that a creditor held an interest adverse to the other creditors, not relevant to prevent him from voting for a trustee.

THE estates of John Gray having been sequestrated, a competition arose between Campbell and Watson for the office of trustee. A remit was made to the Sheriff of Lanarkshire, who reported that the votes in favour of Campbell were £784:19:8½, while those in favour of Watson were £409:11:8½. Against this report various objections were stated by Watson; but the chief one related to the vote of Michael Gilfillan. He held an heritable bond for £735, and it was alleged that he had obtained it under very suspicious circumstances, which it would be necessary for the trustee to expiscate and bring before the Court; that he had an interest directly in opposition to that of the other creditors; and that, as his vote was the largest on the estate, Campbell was in fact his trustee. To this it was answered, that Gilfillan had acquired the bond onerously and fairly; that, in ranking on the estate, he had deducted the value of the security; and that it was not a relevant allegation to prevent him from voting, that he had an interest adverse to that of the other creditors, which was an objection applicable to all the creditors, seeing that each had an interest in opposition to that of all the others. The Lord Ordinary sustained the objection and preferred Watson, 'in respect it appears that Michael Gilfillan has, under his heritable bond for £735, an interest opposite to that of the other creditors; while, exclusive of his votes, the petitioner James Watson has a decided majority.' But the Court altered, sustained Gilfillan's vote, and preferred Campbell.

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Lord Hermand.

S.

*Campbell's Authorities.*—M'Nair, July 11. 1805, (2. Bell, Com. 299); Brown, Feb. 4. 1819, (F. C.); Murray, June 22. 1821, (ante, Vol. I. No. 104.)

*Watson's Authorities.*—2. Bell, 402. 382. 400; M'Tavish, Nov. 13. 1824, (ante, Vol. III. No. 204.)

MACMILLAN and GRANT, W. S.—W. GUTHRIE,—Agents.

No. 104.

J. BLACK, Petitioner.—*Maitland*.D. KENNEDY and A. CAMERON, Respondents.—*Sol.-Gen. Hope*  
—*A. Wood*.

*Sequestration—Creditor—Outlaw—Held, 1.—That a party was not entitled to the character of a creditor, to the effect of applying for a recall of a sequestration, the ground of debt being a decree for expenses which had been issued, not in his, but in his agent's name, who had done diligence on it.—2.—That a reversal of a sentence of outlawry, which had not been followed by denunciation, has a retrospective effect, so as to validate a concurrence as a creditor to an application for sequestration.*

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SEQUESTRATION of Kennedy's estates was awarded on his own application, with concurrence of Cameron a creditor, against whom, several years before, sentence of outlawry had been pronounced by the Court of Justiciary, on his failure to appear to answer to a criminal indictment; but this sentence had not been followed by denunciation. Black alleging himself to be a creditor in virtue of a decree for expenses in an action against the bankrupt, presented a petition, praying for recall of the sequestration, on the ground that the application on which it had been granted was totally null and invalid, the concurring creditor being under sentence of fugitation. Shortly after the presenting of this petition Cameron was reponed; and it was pleaded in answer, 1. That Black was not a creditor, the decree for expenses having gone out in name of his agents, who had not been paid by him, and who had charged Kennedy for the amount; and, 2. That the reversal of the outlawry had a retrospective effect, so as to validate all proceedings during the temporary suspension of rights occasioned by the sentence. The Court dismissed the petition.

**LORD GLENLEE.**—There would have been a difficulty, had there been any proceedings following on the sentence of the Court of Justiciary; but there was no denunciation or registration, and the case must be judged of as if there had been merely a horning for a civil cause, where the production of letters of relaxation would have removed an objection on the ground of want of persona standi. If the objection here had been taken when the petition for sequestration was presented, the Court might have delayed till Cameron was reponed, and then proceeded. It is somewhat like the objection in Gibson against Arbuthnot, \* and must be considered a temporary and suspensive disqualification, the removal of which has a retrospective effect.

**LORD ROBERTSON.**—When the rights of the outlaw alone are con-

\* Ante, Vol. III. No. 314. and Shaw's Appeal Cases, Vol. I. No. 12.



cerned, the reversal might be allowed to operate retro ; but where the rights of third parties are affected, it ought not to be permitted to validate proceedings which were invalid at the time. Suppose Cameron had sat on a jury, would the removal of outlawry validate the verdict ?

**LORD PITMILLIE.**—There is a sufficient answer to the petition, both on the title and on the merits. The decree for expenses being in the agents' names, and they having given a charge for them, Black has no title. On the merits his Lordship agreed with Lord Glenlee.

**LORD ALLOWAY** concurred both as to the title and merits.

**LORD JUSTICE-CLERK** likewise concurred, and further observed—That as § 68 of the bankrupt statute allows another creditor to insist, Cameron, when his disability was removed, might perhaps be allowed to insist as a new creditor, even if the reversal were not sufficient to validate his concurrence.

**W. GUTHRIE, — J. MACDONELL, W. S.**—Agents.

**D. KENNEDY and W. JEFFREY, Complainers.**—*Sol.-Gen. Hope* No. 105.  
—*A. McNeill.*

**JAMES WATSON, Respondent.**

*Sequestration—Process.*—1.—A party preferred as interim factor on a sequestrated estate, in respect of a majority of real votes ;—and,—2.—Although a party does not appear at the bar when a case comes to be advised, yet, if he has given in pleadings, the Court will judge on the merits.

At the election of an interim factor on Kennedy's sequestrated estate, Watson had a majority of votes ; but Jeffrey, the other candidate, alleging that he had the majority of fair and unexceptionable votes, and that there was a strong personal objection to Watson, presented, along with the bankrupt, a petition and complaint to the Court. Watson gave in answers and duples, but made no appearance at the bar when the case came to be advised. The Court held that the appearance in the papers was sufficient to entitle them to judge on the merits ; but being satisfied that the greater part of votes in favour of Watson was founded on fictitious claims, and that Jeffrey had the majority of true creditors, (one of whom was Cameron, then under sentence of outlawry, mentioned in the preceding case,) they found Jeffrey duly elected.

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F.

**J. MACDONELL, W. S.**—**W. GUTHRIE,**—Agents.

brought an action against Wallace and the other builders, and against the Governors, concluding that the former should be ordained to reduce the front walls to a height not exceeding 46 feet, and that the pursuers should be found entitled to retain their feu-duties from the Governors until this condition ~~was~~ implemented, 'in respect of their having themselves sanctioned ' the foresaid erroneous plans and other deviations; or otherwise have severally been guilty of a breach of the foresaid contract, and articles and conditions of roup.' In defence it was pleaded, 1. That the pursuers had no title to complain, because they were not parties either to the contract of 1806, or to the articles of roup; that the only parties who had a right to object were the Governors of the Hospital, to whom the property originally belonged; and that the deviations had been sanctioned by them. 2. That the pursuers had no interest of a legal nature, and that the opposition was in æmulationem. 3. That the original plan, and the conditions as to the height of the buildings, had been made on the supposition that the houses were to have long sloping roofs; but that, since the flat or M roofs had been introduced, the condition had been departed from, and accordingly the houses of the pursuers themselves exceeded the stipulated height. 4. That the Governors were not responsible for the acts of the other defenders, and therefore the feu-duties could not be retained. To this it was answered, 1. That a servitude *altius non tollendi* in favour of all the feuars against each other had been duly constituted, and that the pursuers were therefore entitled to enforce it. 2. That as the defenders had been duly warned, they were in *malâ fide* to proceed with their buildings. The Lord Ordinary pronounced a long and special interlocutor, containing various propositions in law, and finding that the walls must be reduced to 46 feet; that Mr. Maxwell, who had alone completed his titles as a vassal of the Hospital, was entitled to retain his feu-duties till the condition was enforced; but that Mr. Cockburn and Mrs. Dunlop were not so, and appointing Wallace and others to condescend on the measures which they were willing to adopt for reducing the height. But the Court recalled the findings of the Lord Ordinary, and found 'that the pursuers ' are in the right of the dominant tenement, to the effect of being ' entitled to, and enforcing the servitude in question;' adhered to 'that part of the interlocutor relative to the right of the pursuers ' to retain the feu-duties, repelled the defences, and appointed ' the defenders to give in the condescendence ordered by the Lord ' Ordinary.' To this interlocutor they afterwards adhered.

**LORD HENDERSON** was of opinion that the interlocutor of the Lord Ordinary was substantially right; that the conditions were binding on the defenders; and that the pursuers, who had contracted on the faith of them, were entitled to enforce them.

**LORD BALGAY** observed, that it was impossible to throw out of view the contract of 1806 and the articles of roup, the conditions of which were evidently intended for the benefit of the feuars; and that, when they were violated, they had a right to complain, and to insist that they should be duly observed.

**LORD CRAIGIE** agreed in this opinion.

**LORD GILLIES** expressed great doubts as to the pursuers' title to found on the contract of 1806, because they were not parties to it, and the restriction was made with a view to an object which the contracting parties contemplated, and which they alone were entitled to enforce.

The **LORD PRESIDENT** was of a different opinion, and held that a mutual servitude *altius non tollendi* had been created in favour of the grounds acquired by each feuar; and that as the pursuers were in possession of part of these grounds, they were entitled to enforce the servitude against the defenders, who had acquired the ground on the opposite side of the street; so that, quoad this question, the pursuers were in right of the dominant tenement, while the defenders were in that of the servient.

*Pursuers' Authorities.*—Gray, Jan. 31. 1792, (14513); Mutrie, June 26. 1810, (F. C.)

*Defenders' Authorities.*—Gibson, May 4. 1814, (3. Dow, 307); Gordon, Feb. 1818, (6. Dow, 87); 2. Ersk. 9. 3. and 10.—(4.)—Brown, May 4. 1823, (ante, Vol. II. No. 277.)

**J. RUSSELL, W. S.—MACRITCHIE, BAILLIE, and HENDERSON, W. S.—**  
Agents.

**J. GIBSON, Complainer.—Moncreiff—A. Wood.**  
**J. LOCKHART, Respondent.—Cunninghame—Shaw.**

No. 110.

*Sequestration—Oath of Verity.*—Whether an oath as to a debt being just, according to the best of deponent's knowledge and belief, be sufficient to support a claim on a sequestrated estate.

**GIBSON** claimed to be ranked as a creditor on the sequestrated estate of his father, and lodged with his claim an oath bearing that, 'to the best of his knowledge and belief, the debt was justly due. Lockhart, the trustee, having rejected the claim, chiefly on the ground that the oath was one of credulity and not of verity, Gibson presented a petition to the Court, which was remitted to the Lord Ordinary, who remitted to an accountant to ex-

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Lord Medwyn.  
M.K.

amine the vouchers and grounds of claim. The trustee thereupon reclaimed, and contended that the objection to the oath was of itself sufficient to warrant the rejection of the claim; but Gibson having expressed his willingness to emit an oath of verity in the usual form, the Court remitted to the Lord Ordinary, on his doing so, to remit to the accountant, as by the previous interlocutor.

There was considerable difference of opinion on the Bench as to whether the oath, in the form in which it had been emitted, was sufficient; but all the Judges were agreed that no deviation from the usual form should be allowed, without very good reasons; and that as Gibson was willing to take the oath in the common form, he should not be precluded from doing so. The Court refused, in hoc statu, to enter into the consideration of an objection to the claim, founded on Gibson having made oath, in a process under the Act of Grace, that he had no debts owing him, except those contained in a list, which did not include that now claimed against his father.

A. P. HENDERSON,—J. MACKENZIE,—Agents.

No. 111.

W. GALLOWAY, Suspender.—*Neaves.*

ROBERTSON and COMPANY, Chargers.—*Brodie.*

*Guarantee.*—A party having become bound to see the price of certain goods in the hands of a consignee accounted for, and the latter having failed to do so, and having been sequestrated, found not entitled to insist on his discussion in the first instance.

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Lord Medwyn.

B.

ROBERTSON and COMPANY having employed Kincaid to sell certain quantities of grain for them, the price of which amounted to £152, Galloway, along with one Reid, granted a letter binding themselves that they would see the sales accounted for within '14 days.' Kincaid having failed to account for the sales, and having been sequestrated, Robertson and Company raised an action against Galloway on the letter of guarantee, in which they obtained decree. A charge having been given, Galloway presented a suspension, chiefly on the ground that, being a cautioner, he was entitled to insist on Kincaid being discussed, to the extent at least of the debt being constituted against him; and he alleged that, on an accounting, it would appear that Kincaid was not indebted to Robertson and Company, though it was admitted that they had been ranked by Kincaid's trustees for £400. The Lord Ordinary refused the bill, and the Court adhered.

The Court were unanimously of opinion, that Galloway, by the letter, had come under a direct obligation to account for the sales, on Kincaid's failure to do so, within a certain time; and that all he could ask, was an assignment against Kincaid.

A. DUNCAN,—J. ROBERTSON, W. S.—Agents.

CULLEN'S TRUSTEE and Others, Petitioners.—*Cuninghame*.

No. 112.

J. WATSON, Respondent.—*Monteith—Sandford*.

*Messenger's Execution*.—A new execution by a messenger received in correction of a former erroneous one.

THE petitioners, creditors on the sequestrated estate of M'Lucie, presented a petition to the Court, stating that Watson, the trustee, had failed to consign a sum of money, and praying for an order upon him to do so. Warrant of service was granted in the usual form; and the messenger returned an execution, stating that he had cited Watson on the 28th of March 1825. Watson then objected, 1. That the warrant ought to have been extracted, and that, as it had not been so, the officer had no due authority; and, 2. That the copy served upon him bore date the 26th, whereas the execution certified that it had been served on the 28th of March, and was therefore irregular. Lord Craigie, Ordinary on the bills, superseded 'the further consideration of this case for four days, so that the complainers may have an opportunity of directly returning a correct and regular execution of the petition and complaint, or of giving in a new petition and complaint, upon which a warrant may be obtained and correctly executed.' A new execution was then lodged, bearing date the 26th; and the Court, on advising the petition and answers, ordained Watson to consign the money.

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H.

GREGG and PEDDIE, W. S.—J. HAMILTON, W. S.—Agents.

Captain J. H. ARNOLD, Pursuer.—*Cockburn*.

No. 113.

G. LYON and Others, Defenders.

*Cessio*.—THE pursuer of the cessio refused ante, Vol. III. page 645, having obtained an appointment on full pay, which he would necessarily lose if not allowed to join his regiment, the Court granted the benefit of cessio, he producing with his disposition omnium bonorum evidence of his being required to join his regiment.

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2D DIVISION.  
B.

Æ, M'BÉAN, W. S.—J. ARNOTT, W. S.—Agents.

No. 114. Sir G. A. ROBINSON and Others, Petitioners.—*Monsieiff—Gibson-Craig.*

EARL OF FIFE.—*Dean of F. Cranstoun—Ivory.*

*Sequestration of Lands.*—Held incompetent to sequester lands, the heritable debts over which did not nearly exhaust them, and there being no competition.

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M'K.

THIS was an application at the instance of one personal and two heritable creditors of the Earl of Fife, praying for sequestration of his lands, the rental of which was about £24,000, burdened with annuities to the extent of £13,000 a year, his personal debts amounting, as alleged, to £186,000. Lord Fife opposed the application on the ground, that as there was no competition between the heritable creditors, and their debts did not exhaust the property, and as there was no ranking and sale, so as to produce a competition on the part of the personal creditors, it was incompetent to award sequestration. The Court refused the petition.

Their Lordships were of opinion that, in determining the competency of awarding sequestration, the amount of personal debts could not be taken into consideration, and that personal creditors, not having done diligence against the estate, though they might oppose, had no title to apply for a sequestration. They likewise held it to be incompetent to award it unless there was competition, and the heritable debts were so great as nearly to exhaust the property.

STRACHAN and DARLING, W. S.—INGLIS and WEIR, W. S.—Agents.

No. 115. W. SHEILLS, Suspender.—*Pyper—H. Bruce.*

Sir J. DALYELL, Changer.—*Skene—Macdonochie.*

*Master and Servant—Process—Suspension.*—Held,—1.—That a master agreeing to furnish clothes to a servant out of livery, the clothes remain the property of the master.—2.—That it is incompetent to remit a bill of suspension of a charge for expenses proceeding on a decree of absolvitor, with instructions to open up the cause on the merits.

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Bill-Chamber.  
Lord Eldin.  
M'K.

SIR JAMES DALYELL of Binns, at engaging Sheills as his butler, offered him alternatively 33 guineas in full of yearly wages, 'or £22, Sir James furnishing the servant with his clothes, except his hat.' Sheills accepted the latter offer, and entered into Sir James's service, where he remained a year. During this time he was supplied by Sir James with clothes. These were not livery but plain clothes, and were almost entirely cast clothes of Sir James himself, refitted for the servant. On leaving his

service at the end of the year, Sheills took with him his trunk, containing all his wearing apparel, including the clothes furnished by Sir James, and worn during his service, and deposited it at a carrier's quarters, to be forwarded to Edinburgh. Without obtaining any warrant or authority, Sir James sent for the trunk, carried it back to his own house, and refused to deliver it up, unless Sheills restored two dressing jackets which had been furnished new, and an old coat. Sheills then raised an action before the Sheriff of Linlithgow, concluding for delivery of the trunk. In defence Sir James pleaded, that when a master agrees to furnish clothes to his servant, the presumption is, that they are intended to remain the property of the master at the end of the service, unless there be a special agreement to the contrary, and that he was therefore entitled to take possession of the clothes. To this it was answered, that such a presumption only held as to livery clothes, and that plain clothes always belong to the servant. The Sheriff, holding a special contract necessary to entitle a servant to clothes, whether livery or not, allowed a proof, in which Sheills failed to establish any such special agreement; and the Sheriff accordingly assolized Sir James, with expenses. Sir James having extracted the decree for expenses, and given a charge for payment, Sheills presented a bill of suspension; on advising which, the Lord Ordinary remitted to the Sheriff with instructions to recall his interlocutor, 'and to find that the charger having made an offer of 83 guineas of wages, which was not accepted of by the complainer, must be understood to have bestowed the wearing clothes in question upon the complainer as a consideration for his services; and therefore to decern in favour of the complainer for recovery of the trunk and its contents, and for expenses of process before the Inferior Court.' Sir James petitioned against this interlocutor, and, besides his pleas on the merits, he contended that it was incompetent for the Lord Ordinary, in a suspension of a charge for expenses, proceeding on a decree of absolvitor, to remit with instructions to open up the cause. To this it was answered, that in virtue of the 50. Geo. III. c. 112, and 1. and 2. Geo. IV. c. 38, the Lord Ordinary was entitled to remit the cause with instructions in suspensions, in the same way as in advocations. The Court, 'in respect the bill of suspension could not competently bring under the review of the Lord Ordinary any thing more than the matter of the charge, which in this case extended only to the expenses awarded by the Sheriff, recall the interlocutor complained of; and having considered the question so far as competently stated in the bill of suspension, remit to

‘ the Lord Ordinary to refuse the bill.’ To this interlocutor their Lordships, after being equally divided, by a majority adhered.

On the point of competency, the Judges, with the exception of Lord Alloway, were agreed, that although the Lord Ordinary is entitled on bills of suspension to remit the cause to the Inferior Court, it is only the cause brought before him in the bill of suspension ; and that, therefore, as the decree of absolvitor could not be brought before him by the bill, but only the charge for expenses, it was incompetent to remit with instructions on the merits, which could only be taken into view in order to determine the propriety of the decerniture for expenses. As to the merits, however, the Bench was much divided in opinion.

**LORD JUSTICE-CLERK** observed—There is no principle for applying a different rule to the case of plain clothes and of livery clothes. When a master agrees to furnish his servant with clothes, they remain the master’s property, unless there be a special bargain to the contrary. The servant here attempted to prove such an agreement, but having failed, the Sheriff’s interlocutor is right.

**LORD GLENLEE**.—The view of the merits taken by the Lord Ordinary is correct. The transaction here was, that the servant, instead of furnishing his own clothes, was to get less wages ; the clothes were substituted for wages, and should be in the same situation as if he had taken the higher wages, and purchased the clothes.

**LORD PITMILLY** agreed with Lord Justice-Clerk, that there was no distinction between livery and plain clothes, and that the master could only be held to give the use of them.

**LORD ALLOWAY**.—The custom of the country must regulate the meaning of the contract, where there is no special agreement ; and as it was never heard of that a master took back any other than livery clothes, it must be held to have been the meaning of parties that the clothes in this case were to belong to the servant, the more especially as all the clothes furnished did not nearly amount in value to the difference between £22 and 33 guineas. It is also a sufficient ground for refusing Sir James his expenses, that he unwarrantably took and retained possession of the servant’s trunk, containing his whole wearing apparel, thus rendering an application to the Sheriff absolutely necessary.

**LORD ROBERTSON**.—The servant’s plea must rest either on special agreement or general usage, which would rule the contract. He has failed to establish a special agreement, and usage is against his right to retain the clothes.

*Suspender’s Authority*.—(Competency,) Smith, Feb. 12 1825, (ante, Vol. III. No. 363.)

*Charger’s Authority*.—Sycke, Feb. 24. 1741, (15163.)

J. G. BARR,—GIBSON-CRAIGS and WARDLAW, W. S.—Agents.



R. THOMPSON and SON, Suspenders.—*Boswell.*

No. 116.

A. ROBERTSON, Charger.—*More.*

*Process—Bill-Chamber.*—A bill of suspension being presented without caution, allowed to be seen on caution by an Ordinary in vacation, and thereafter refused by the Ordinary on the bills in respect of no caution, on a petition reclaiming only against the last interlocutor, the Court allowed the prayer to be amended so as to reclaim against both, and thereafter passed the bill.

THOMPSON and SON presented, without caution, a bill of suspension of a charge given them by Robertson on a promissory note, on the ground that he had obtained it from them while bankrupt, as the price of his concurrence to a discharge on a composition contract. Lord Hermand, before whom the bill came in time of vacation, pronounced an interlocutor allowing it to be seen 'on caution.' No caution having been found, Lord Medwyn thereafter, in respect thereof, refused the bill. Thompson and Son then presented a petition, reclaiming only against Lord Medwyn's interlocutor. The Court allowed them to amend the prayer of their petition, so as to reclaim against Lord Hermand's also; and this being done, they recalled the two interlocutors, and passed the bill without caution or consignation.

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Bill-Chamber.  
Lord Medwyn.  
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J. MACANDREW,—W. INGLIS,—Agents.

J. MAXWELL, Pursuer.—*Pyper*—*H. Bruce.*

No. 117.

R. DRUMMOND'S TRUSTEES, Defenders.—*Cuninghame.*

*Heritable Security—Reduction under 1696, c. 5.—Res Judicata.*—1.—Bond for a definite sum, but declared by back letter to be intended only to cover certain obligations, held good to the extent that there were actually due at the date of the bond—2.—Whether a judgment is a suspension from a res judicata in a reduction, as to the same legal pleas.

IN 1810 Maxwell granted to the late Robert Drummond a disposition, with powers of sale, in security of the sum of £500 which he acknowledged himself to be then 'justly addebted and owing' to Drummond, who, however, of the same date, granted a back letter in the following terms:—'Although you have this day granted me an heritable bond over part of your property in the South street for £500, yet I hereby declare that it is only granted me for security of certain sums, in which I am bound for you by bills or otherwise; and that so soon as these and any accounts betwixt us are settled, the said heritable bond to be of no effect, and to be discharged and renounced.' At the time of

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Lord Eldin.  
H.

receiving this security, Drummond was cautioner for Maxwell in a bank credit, the full amount of which was drawn out; and in the course of the year 1811, Maxwell having become bankrupt, he was obliged to pay it to the bank to the extent of £430, and he had a further claim of £45 against Maxwell on other grounds. After Drummond's death, his trustees in 1820 sold the property to themselves under the authority of the Sheriff, and charged Maxwell to subscribe a disposition in their favour in terms of a decree of the Sheriff. This Maxwell refused to do, and presented a bill of suspension, which was in 1823 refused by the Lord Ordinary and the First Division of the Court.\* He then brought a reduction of the disposition in security on the act 1696, c. 5, as being granted for a future debt; and he further contended that, at all events, the back letter declaring it to be granted in security of sums due 'by bills or otherwise,' it could not be construed to cover a cautionary obligation. To this it was answered, that the sum in the disposition was definite, and was, with the exception of about £25, actually due at its date; that the expression 'by bills or otherwise' was sufficiently broad to include the cautionary obligation; and further, that the judgment of the First Division formed a *res judicata*. The Lord Ordinary repelled the reasons of reduction, and the Court adhered.

The Court, while they held the judgment of the First Division not to form a *res judicata*, considered it an authority on the point; and on the merits they were agreed, that the sum in the bank credit being actually drawn out at the date of the bond took the case from under the statute, and that the bond therefore was effectual to cover all that was actually due at its date.

J. JOHNSTON jun.—W. BENNET, W. S.—Agents.

No. 118.

J. MALCOLM, Petitioner.—*Ivory*.

R. W. NIVEN and Others, Respondents.—*M'Nall*.

*Agent and Client*—A. S. Feb. 6. 1806.—A remit made to the auditor of an agent's accounts in terms of the A. S., although the employment was denied,—the liability being, however, admitted.

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MALCOLM, an agent before the Court of Session, presented a petition to have his accounts remitted to the auditor, and decree pronounced in terms of the act of sederunt. Some of the respondents denied that they had employed him, but admitted their liability, as being creditors upon the sequestrated estate to which

\* See Maxwell, Jan. 21. 1823, ante, Vol. II. No. 128.

the accounts related. Having objected that, as the employment was denied, the application quoad them was incompetent, the Court repelled the objection, in respect that they admitted their liability, and decreed in terms of the report of the auditor.

J. MALCOLM,—LINNING and NIVEN, W. S.—Agents.

ELIZABETH BAXTER, Pursuer and Respondent.—*Moncreiff—* No. 119.  
*Marshall.*

A. FORSYTH and Others (DOUGAL'S TRUSTEES,) Defenders and  
Petitioners.—*Sol.-Gen. Hope—D. of F. Cranstoun—Forsyth.*

*Parent and Child—Bastard.*—The mother of a natural child of six years old, to whom a large fortune had been left by the father, found entitled to the custody in the mean while,—to an aliment for the child,—and to an allowance for a house, and the expenses of education.

ELIZABETH BAXTER, while residing as a servant with George Dougal, shipowner in Kirkcaldy, was delivered of a natural daughter, of which he was the father. Soon after the birth, he made a deed of settlement, conveying his whole moveable property to Forsyth and others, as trustees for behoof of the child, and named them, together with a lady, (who was one of his own relations,) to be its tutors and curators. This deed was burdened with an annuity of £100, payable to the mother during her life; and the trustees were authorized to pay such sums out of the interest of the funds as were necessary for the support and education of the child. Mr. Dougal died in 1823, and the value of the property was found to be at least £60,000. In July. 1824 (at which period the child was five years and seven months old) her mother raised an action against the trustees, founding upon the deed of settlement, and stating that the child had arrived at that time of life when it was necessary to commence her education; that she ought to have one suitable to her fortune; and that a proper aliment should in the mean while be allowed to her. She therefore concluded, that the trustees should be ordained to pay to her £200 sterling per annum in name of aliment for the child, and £600 yearly for her board, clothing, and education, during her minority. After this action had come into Court, the trustees presented a petition, praying that the mother should be ordained to give up the custody of the child to them, so as to enable them to give it a proper education. In support of this demand, and in defence against the action at the mother's instance, they pleaded, 1. That she had no title to pursue the action, or to insist on keeping the child; 2.

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That she was barred personali exceptione from making the demand contained in her summons, because they were appointed tutors and curators by the trust-deed, which necessarily implied that they were to have the custody of the child, and the mother must be held to have homologated that deed by accepting of payment of the annuity there provided to her; and, 3. That, in the circumstances of this case, it was expedient that the child should be removed from her mother; because, being the heiress of so great a fortune, she ought to receive an education, and be trained up in habits, feelings, and manners, so as to enable her to enter into superior society, which it was impossible to do if she resided with her mother; and were she to continue to associate with a person in the situation of her mother, whose character necessarily excluded her from all proper society, the future happiness and prospects of the child would be entirely ruined. To these pleas it was answered, 1. That the mother was entitled by law to the custody of the child, and more especially while she was at so tender an age; 2. That no act of hers could entitle the trustees to withhold from the child that which was necessary for its aliment and education, and therefore the plea of homologation was inapplicable; and, 3. That she was desirous that the child should be properly educated, and was willing that her education should be intrusted to any governess selected by the trustees, but that she could not consent that the child should be taken away from her until she was at least ten years of age; and that it appeared from letters written by Mr. Dougal, that it was his wish that the child should remain under her care. The Court, after advising memorials and a condescendence and answers, found the trustees 'liable to furnish to the pursuer, as aliment for her daughter, 'the yearly sum of £150 sterling, and that from George Dougal's 'death, 26th August 1823, to be paid to her in advance, and by 'half yearly payments; as also in the yearly sum of £40 sterling for the rent of a house, and that by half yearly payments;' and 'in such reasonable sums of expense as may be necessarily laid 'out or incurred in the education of the said Elizabeth Dougal, '—such sums to be paid on a regular account, with sufficient 'vouchers, being exhibited to them, and that half yearly;' refused the petition for the trustees in hoc statu, and found them liable in expenses, payable out of the trust-funds.

**LORD HERMANS.**—There is no impeachment of the conduct of the mother, further than that arising from the circumstance of being the mother of the child. It appears also that Mr. Dougal had an

affection and a regard for her; and nature points her out as the best person with whom to intrust the child at its present tender age. She is therefore entitled to an allowance for the child.

**LORD BACGRAY.**—Whatever may be the consequences, we are not entitled to deviate from the general rule of law. It is undoubted, that where parents maltreat their children, or violate the trust committed to them by nature, the Court is entitled to interfere, whether the children be legitimate or illegitimate. But it is only in such a case that the parents can be deprived of the custody of their children. The law of nature, the civil law, and the law of Scotland, concur in holding that a mother of an illegitimate child is entitled to the custody of it in its tender years, where there is no accusation against her except that which arises from the circumstance of her being the mother of the child. If she misbehave, or if she marry a stranger, the Court are entitled to interfere for the protection of the child. In this case, there is no charge of misconduct against the mother, and it was the opinion of the father that she was a person worthy of confidence, and for whom he had a regard. It would therefore be nothing else than tyranny and oppression to take the custody of this child from the mother. If the father had been demanding possession, he could not have got it; and if not, the trustees, who stand in his place, can have no better right.

**LORD CRAIGIE.**—There is no fixed rule as to the custody of illegitimate children; and the only general one which can be laid down is, that the Court must attend chiefly to what is most beneficial for the child. No doubt, the father wished the mother to be the nurse of the child in its infancy; but he never could mean that its education was to be confided to her when it arrived at a proper age. He showed this clearly by putting the funds into the hands of trustees, and authorizing them to apply the interest to that purpose. The child is, from its fortune, entitled to move in superior society, and it is of importance that its feelings and habits should be properly attended to even at this early age. Unless this be done, and the Court interfere, by taking the child from the possession of the mother, its future happiness and prospects may be ruined. The mother will be entitled to have access to the child, but she ought not to be her regular companion.

**LORD GILLIES.**—There is considerable difficulty, on legal grounds, in depriving the mother of the custody of the child. There is no doubt that the Court has power to protect both young and old against wrong; and if parents act improperly and illegally, the Court has a right to interfere. That rule applies to the parents of legitimate children, and a fortiori to the mother of a natural child. But here there is nothing alleged against the mother; and the

general rule is, that she is entitled to the custody of her child. This is established both by the civil law and by that of Scotland, and accordingly the custody has been repeatedly refused to a father. The only charge which is brought against this mother is, that she is a person of *lapsed virtue*; and the proof of this is, that she is the mother of this child. But this may be said against every mother of a natural child, and cannot affect the general rule. Neither can the circumstance of the child having been left a large fortune alter that rule. Had it been bequeathed by an entire stranger, he could not on that account have insisted for possession of the child; and, in point of law, Mr. Dougal stands in that situation.

**LORD PRESIDENT.**—There is certainly nothing charged against the mother; but she is not qualified to educate the child, nor to fit her for acquiring proper friends, and introducing her into proper society. The common rule no doubt is, that the custody of a natural child belongs to the mother; but this is liable to be affected by circumstances, and by what is most advantageous for the child. In this case, the child has a fortune which may enable her to enter into the highest society, and she ought to be educated accordingly. The mother, however, insists upon keeping her till ten years of age; and, from her own rank in life, she must necessarily communicate sentiments, habits, and manners which it would be difficult to root out, and may prove ruinous to the child. It is absurd to suppose that a respectable governess will reside or associate with the mother of a natural child, and difficulties will thus exist which may entirely prevent the education of the child at a very important period of life. The Court, therefore, will exercise their discretion soundly in removing the child from its mother.

*Purveyor's Authorities.*—1. Dig. 5. 24. De Statu Hom.; Bingen, March 4. 1758, (1357); Short, Feb. 21. 1795, (442); Godby, July 7. 1815, (F. C.); Hunter's Trustees, Dec. 2. 1820, (F. C.); 1. Ersk. 7. 2. 24.

*Defenders' Authorities.*—(1.)—Cunningham, Jan. 17. 1758, (617); Gibson, June 20. 1786, (620.)

A. SCOTT, W. S.—FORSYTH and MACDOUGALL,—Agents.

A. M'NEIL and Others, (Assignees of M'GUFFOCK, &c.) Petitioners.—*Baird*. No. 120.

J. V. ACONNEW, Respondent.—*Pyper*.

*Execution pending Appeal*.—Circumstances in which execution pending appeal for payment of expenses was awarded, although the summons concluded only for retention of them out of certain rents.

M'GUFFOCK and others, assignees of a tack granted by the father of the respondent, raised an action against the latter, alleging that he had failed to erect a steading on the farm in terms of the lease, and concluding for retention of the rents in liquidation of the damages thereby sustained; and also that they 'should be found entitled to retention as aforesaid of the sum of £100, or such other sum, more or less, as our said Lords may find due of expenses of process,' &c. Various defences were stated, but they were repelled, and the respondent was subjected in expenses. He then objected, that being an heir of entail, he did not represent the granter of the lease, and therefore was not liable for damages arising from a failure to implement a personal obligation. The Lord Ordinary found, 'that the previous expenses incurred by the former pleas which have been decided in the pursuer's favour, must be paid before the new discussion can be entered into.' The respondent having reclaimed, the Court appointed his petition to be answered upon condition of payment of the previous expenses; but he having refused to do so, they, in respect thereof, refused the petition. (See ante, Vol. III. No. 383.) The respondent having appealed the whole case to the House of Lords, M'Neil and others (the trust-disponees of M'Guffock and others) applied for execution pending the appeal as to the expenses of process. To this it was objected, 1. That as the summons concluded not for payment, but merely for retention of the rents, it was not competent to ordain expenses to be paid; and, 2. That as the respondent had not availed himself of the option to pay the previous expenses, they could not be awarded against him. To this it was answered, 1. That the respondent had, by his own act, during the currency of the process, rendered the conclusion for retention ineffectual by uplifting the rents, and therefore he could not avail himself of that plea; and, 2. That there was a decree for the expenses which had been incurred prior to the period when the new plea was advanced, which could not be affected by the respondent not having taken advantage of the option to pay expenses which had been given to him. The

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Court granted execution pending appeal, on caution, in relation to the expenses for which decree had been pronounced, but refused it as to those subsequently incurred.

The majority of the Court were of opinion that Mr. Agnew, by uplifting the rents, could not avail himself of the plea arising from the terms of the summons; but Lord Gillies thought that it was incompetent to ordain the expenses to be paid, as the conclusion was limited to retention.

J. R. SKINNER, W. S.—J. B. GRACIE, W. S.—Agents.

No. 121.

T. LENNOX, Pursuer.—*Smollett*.  
HIS CREDITORS, Defenders.—*Brown*.

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F.

*Cessio Bonorum*.—Judgment refusing cessio, ante, Vol. III. No. 481, adhered to, there being a great defalcation of property unaccounted for, admitted to have been in possession of the pursuer when he first became insolvent, and strong grounds for suspecting a fraudulent concealment of funds.

It was observed, that although the Court had laid down the rule, in *Crawford v. Likely*, that length of imprisonment should atone for extravagance, that relaxation ought not to be granted when there appeared to be a concealment of funds.

R. KENNEDY, W. S.—A. CROMBIE, W. S.—Agents.

No. 122.

Sir H. D. HAMILTON, Petitioner.—*Moncreiff*.  
Mrs. H. FULLERTON, Respondent.

*Inhibition*.—The House of Lords having reversed that part of a judgment of the Court recalling an inhibition, which ordained it to be scored in the record, the Court allowed the petition to apply the judgment of the House of Lords, with the deliverance thereon, to be inserted in the register.

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MRS. FULLERTON having appealed against the judgment mentioned ante, Vol. II. No. 241, recalling the inhibitions used by her on the dependence of her action against Sir Hew Hamilton, the House of Lords, *hoc statu*, affirmed the judgment in so far as it recalled the inhibitions, but reversed it in so far as it found them to have been 'nimious and oppressive,' and ordained them, agreeably to common form, 'to be scored in the record, and marked 'on the margin.' In a petition to apply this judgment, Sir Hew prayed for warrant to authorize his petition, and the judgment



thereon, to be recorded in the register of inhibitions, and the dates marked on the margin, that the diligences which were prevented by the judgment of the House of Lords from being scored and discharged in the usual manner, might not continue to appear in the record as subsisting against him. The Court granted his prayer.

RUSSELL, TOD, and HILL, W. S. Agents.

DUKE OF QUEENSBERRY'S EXECUTORS, Pursuers.—*Dean of Fac. Cranstown—Rutherford.* No. 123.

C. TAIT, Defender.—*Moncreiff—Matheson—Tait.*

*Agent and Client.*—Circumstances under which the accounts of a law agent, regularly rendered for several years, and not objected to, were held liable to be audited.

THIS was a branch of the case noticed ante, Vol. I. No. 486, regarding the settlement of the accounts of Mr. Tait, as factor and agent of the late Duke of Queensberry for the last twenty years prior to his Grace's death. Mr. Tait had annually rendered his accounts, but they had never been formally docqueted by the Duke; and the Court had therefore found that they were still subject to be objected to and audited at the instance of his Grace's executors, who raised an action concluding for repetition of £10,000, as erroneous charges by Mr. Tait. The Court at first remitted to Mr. Brown, an accountant, to audit and report; but, on receiving his report, they remitted to Mr. Aytoun, writer to the signet, considering an agent to be better fitted for this duty than an accountant; and their Lordships ultimately, after a great deal of procedure, allowed the deductions recommended by Mr. Aytoun.

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Lord Pitmilley.  
B.

The Court considered that the general principles which should regulate the auditing of a series of accounts annually rendered, but not formally settled, was, that the items should be judged of with reference to the other charges, and to the principles on which the accounts were framed; and it was observed, that when these were departed from, and attempted to be overturned by the employer, it would be competent for the agent to remodel his accounts, and alter his charges, so as to adapt them to any new principle on which the accounts were to be settled.

J. GIBSON jun. W. S.—W. CLARK, W. S.—Agents.

No. 124. Honourable Mrs. STEWART M'KENZIE and HUSBAND, Pursuers.

—Murray—Rutherford.

Rev. W. M'CRAE, Defender.—Sir J. Connell.

*Glebe.*—Held,—1.—That in designing sixteen souns of pasture in lieu of an arable glebe, the presbytery are not bound to exclude small patches of arable ground interspersed through it.—2.—That, in peculiar circumstances, such a glebe may be designed partly out of ground near the manse, and partly out of moor pasture at a distance.—3.—That the amount of a soun must be regulated by the custom of the district.

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Lords Pitmilley  
and Eldin.

M'K.

ON the application of the Reverend Mr. M'Crae, minister of Barras in the island of Lewis, the presbytery designed to him sixteen souns of pasture as a substitute for an arable glebe,—each soun (agreesably to the estimation in that part of the country) being sufficient to pasture a cow and her calf till it was a year old. Of this designation Mrs. Stewart M'Kenzie, the sole heritor of the parish, brought a reduction, on the allegation that there were arable lands in the parish,—and that, therefore, the presbytery could not competently design the sixteen souns of pasture, which was allowed by the act 1606 only when there was no arable land. The Lord Ordinary remitted, with consent of parties, to Mr. Lawrie, a land-valuator, to report on the nature of the glebe which had been designed in the description of the land in the parish, and all facts necessary to the decision of the cause. Mr. Lawrie reported that there were not four continuous acres of land in the parish 'fit for the operation of the plough,'—and that the glebe designed was most commodious and advantageous to both parties. Mrs. M'Kenzie then, besides disputing the reporter's accuracy as to there being no arable ground fit for a glebe, contended, 1. That the presbytery ought to have excluded certain small patches of land interspersed through the glebe, and which were in use to be cultivated in rotation with a kind of crooked spade; 2. That as it was the universal custom in the island of Lewis to pasture the cattle in the summer in the upland moors, and keep them on the low grounds in winter, the presbytery ought not to have designed the glebe entirely out of the low ground, but to have taken a proportion of moor ground, which was however admitted to be at some distance from the manse;—and, 3. That they ought to have calculated the soun as pasture for a cow only, and not for a cow and calf. Lord Pitmilley found that the presbytery 'ought to have designed for each soun a quantity of ground 'equal to pasture one cow, and not, as was done by them, ground 'equal to pasture one cow and a calf till the calf is a year old;'

but otherwise approved of the designation. Lord Eldin, before whom the case subsequently came, while he adhered as to the amount of the soun, found that the presbytery had no right to include arable ground in the glebe, and to that extent reduced the designation. The minister having petitioned against these interlocutors, the Court 'recalled them, and found that, in designing ground to the petitioner in lieu of an arable glebe, the presbytery are not bound to exclude interjected patches of arable ground; but that in such designation it is necessary to have reference to the practice of the country of sending the cattle to the hill pasture during a part of the year, and that the petitioner is only entitled to such portion of the lower ground of the farm, as, together with a corresponding proportion of hill pasture, shall afford sixteen souns of grass throughout the year, each soun being sufficient for the pasture of a cow with her calf until a year old; and remitted to Mr. Lawrie to make a report in terms of this interlocutor, and instructed him, before making such report, to receive any communication which the parties, or either of them, might think fit to make to him;—and found, that if the ground designed shall be burdened with school-house and schoolmaster's garden, such allocation shall be subject to a suitable compensation to the petitioner; and reserved entire all questions of expenses hinc inde.'

The Court were agreed that it was impossible to exclude the small patches of arable land interspersed through the glebe, but differed as to the competency of designing part of the glebe from the moor at a distance from the manse. Two of their Lordships held that the whole glebe must be contiguous, and near the manse; but the majority were of opinion that the peculiar custom of the country, arising from its local character and situation, rendered it competent to deviate from the general rule. In regard to the amount of the soun, their Lordships held that it must depend on the understanding and practice of the district, which, in the present case, regulated the amount of the soun to be equal to pasture a cow and her calf; and it was observed that in dairy counties, where the produce of the cow is realized in milk and butter, it would, in point of fact, require as much pasture to feed a cow without a calf, but milked daily, as in breeding districts to feed a cow and her calf.

MURRAY and INGLIS, W. S.—R. ATTOUN, W. S.—Agents.

No. 125.

R. WALKER, Suspender.—*Moncreiff—Rutherford.*A. WISHART, Charger.—*Dean of F. Cranstown—More.*

*Servitude.*—Circumstances in which a party was found entitled to build to a greater height than was allowed by his title-deeds.

July 7. 1825.

1st Division.  
Bill-Chamber.  
Lord Eldin.

THE Magistrates of Edinburgh, as superiors, feued to several persons, by separate titles, different parts of a piece of ground on the south side of west Register street, Edinburgh. Among others, they granted a feu-right in favour of Dumbreck, 'but always with and under the restriction, that the said Mr. Dumbreck and his foresaids are not to erect any buildings upon the foressaid ground in said stable-court, to rise any higher above the surface of the ground than the coach-house and stables already built: that is to say, the side-walls are not to be above 15 feet in height.' The feuars, however, and particularly Walker, had erected buildings which exceeded this limited height, and Dumbreck applied to and obtained authority from the Dean of Guild to build a tenement, of which the walls were to be 23 feet high. He afterwards conveyed his feu with this warrant to Wishart, who immediately began to erect the proposed building. A bill of suspension and interdict was then presented by Walker, who contended, 1. That Wishart was not entitled to make his side-walls higher than 15 feet; and, 2. That he was proceeding to build on the area of a court which was common property, and on which none of the feuars were entitled to build. The Lord Ordinary having granted the interdict and passed the bill, Wishart reclaimed, and contended, 1. That the limitation was merely in favour of the superiors, and that it must be held to have been discharged by the warrant of the Dean of Guild, as the representative of the Magistrates; 2. That there was no mutual servitude; and that even although there were, yet it had been given up by all the feuars, and particularly by Walker, who had erected buildings of a greater height. To this it was answered, 1. That a clause similar to the above was in the titles of one of Walker's authors, and also in those of the other feuars; that as a servitude was thereby created in their favour, the superiors could not discharge it,—and that even if this were competent, it was impossible to hold that the warrant of the Dean of Guild amounted to such a discharge; and, 2. That although it was true that his buildings exceeded the limited height, yet he was willing that Wishart should be allowed to build to the same height. The Court recalled the interlocutor of the Lord Ordi-

nary, 'in so far as regards the height or elevation of the building in question;' but adhered as to the interdict and passing of the bill against building on the common area.

The Judges were of opinion that the limitation in the titles had been abandoned on all hands, and particularly by Walker; and therefore he could not insist on enforcing it against Wishart.

*Suspender's Authorities.*—Gray, Jan. 31. 1792, (14513); Mutrie, June 26. 1810, (F C.)

*Charger's Authority.*—Brown, May 14. 1823, (ante, Vol. II. No. 277.)

W. KENNY, W. S.—A. ROBERTSON, W. S.—Agents.

Sir W. FETTES and Others, (RITCHIE's Trustees,) Pursuers.— No. 126.  
*Graham Bell.*

Dr. GORDON and Others, Defenders.—*Matheson.*

*Presumption—Death.*—Two persons having gone abroad as sailors in 1791, and never having been thereafter heard of, the fee of certain sums bequeathed to them, whom failing to substitutes, ordered to be paid to the latter, on finding caution to repeat.

THE late William Ritchie, in 1821, executed a deed of settlement, by which he conveyed his whole effects to the pursuers, in trust, for payment, inter alia, of the interest to his wife during her life, and on her death, of one third part of the fee to his eldest son James Ritchie, another third to his second son Campbell Ritchie, and the remaining third to the defenders, the children of his daughter. He also declared, that in the event of the death of his sons, their shares were to be paid to the defenders equally between them. James and Campbell Ritchie were both sailors, and had gone to America, the former in 1791, and the latter in 1801. They had never since been heard of; and the liferentrix having died in 1822, the trustees immediately brought a process of multiplepoinding and exoneration, in order to have it settled to whom the money should be paid. A claim was lodged by the defenders for the whole sum, on the ground that James and Campbell Ritchie must be presumed to be dead. The Lord Ordinary, on the 19th of June 1822, appointed intimation of the process of multiplepoinding to be made in two of the Edinburgh and London newspapers, and also in such American newspapers as the trustees should see fit, for three times at least, and likewise in the minute-book. This having been done, and after the lapse of 18 months no appearance being made, his Lordship reported the case to the Court, who appointed the money to be paid to the defenders, on finding caution

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1st DIVISION.  
Lord Meadow-  
bank.  
H.

to repeat the shares of James and Campbell Ritchie, in the event that they should afterwards appear.

*Defender's Authorities.*—Erkine, June 25. 1622, (11656); Ruthven, Feb. 29. 1628, (11629); Sands, Dec. 27. 1678, (12645); Campbell, June 17. 1824, (ante, Vol. III. No. 108.)

LOW and RUTHERFORD, W. S.—A. GOLDIE, W. S.—Agents.

No. 127. Mrs. FAIRIE and Others, Pursuers.—*Green Shields—Moncreiff—Cunninghame.*

EARL of EGLINTOUN's TRUSTEES, Defenders. — *Dean of F. Cranstoun—Jameson.*

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Lord Meadowbank.  
H.

THIS was a special case relative to the liability of the late Earl of Eglintoun for a sum of money lent by the pursuers to the late Mr. Crichton, the agent and factor of his Lordship. In defence, it was denied that Mr. Crichton had any authority to borrow the money on behalf of his Lordship, or that it had ever been received by him. The Lord Ordinary assoilzied the defenders; but the Court, on advising a condescendence and answers, and the declaration of the secretary and bookkeeper of the Earl, altered and decerned in terms of the libel.

R. DUNLOP, W. S.—RUSSELL, ANDERSON, and TON, W. S.—Agents.

No. 128. WM. WILSON, Pursuer.—*Green Shields—Cay.*  
DUKE of HAMILTON, Defender.—*Jardine.*

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D.

WILSON, who had formerly been overseer of the farms on the estate of Hamilton, raised an action of count and reckoning against the Duke. The case was altogether of a special nature; and the Lord Ordinary and the Court, on advising reports of an accountant, assoilzied the defender.

J. JOHNSTON jun.—R. RUTHERFORD, W. S.—Agents.

ARCHIBALD BRUCE, Petitioner.—*Whigham*.  
 DAVENPORT and COMPANY, Respondents.—*Buchanan*.

No. 129.

*Sequestration—Trustee*.—Held, in a question as to the discharge of a trustee,—1.—That the concurrence of four-fifths of creditors present was sufficient to authorize the sale of outstanding debts due to a sequestrated estate.—2.—That the acceptance by a trustee of too high a commission, and not lodging sederunt book in due time, are not sufficient grounds for refusing his discharge;—and,—3.—Observed that a commission of 25 per cent. on the funds recovered is too large an allowance to a trustee.

AN application by Bruce, trustee on a sequestrated estate, for exoneration and discharge, was opposed by Davenport and Company, creditors, on the grounds, 1. That he had sold the outstanding debts of the estate under the authority of a meeting consisting of only three out of seventeen creditors ranked on the estate, whereas, they contended, it required the consent of four-fifths of the whole creditors; 2. That he had not lodged a duplicate of the sederunt-book; and, 3. That he had accepted a commission amounting to 25 per cent. on the whole sums recovered. The trustee contended that the creditors having, at a general meeting, approved of his conduct, a single creditor could not now object; and he answered, 1. That the statute requires the consent of four-fifths of the meeting only, and not of the whole creditors, to authorize the sale of outstanding debts; 2. That the failure to lodge the sederunt-book arose from want of funds, and had been remedied before the objection was stated; and, 3. That the creditors in general had sanctioned the allowance made by the commissioners. On the verbal report of the Lord Ordinary, to whom the petition was remitted, and a discussion at the bar, the Court granted the prayer of the petition.

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 Lord Medwyn.

Their Lordships were of opinion that the amount of commission was greatly too high, but observed that having been sanctioned by the creditors, and not complained of in proper time, they could not refuse the trustee his discharge for having accepted it. They also held that the statute, though not express on that point, authorized a sale of debts on the concurrence of four-fifths of the creditors present at the meeting, and did not require that of four-fifths of the whole body; and they thought that the failure to lodge the duplicate of the sederunt-book in due time (that being now done) was not a sufficient ground to warrant a refusal of the trustee's discharge.

JAMES BALFOUR, W. S. Agent.

- No. 130. JEAN BROWN OF MONKHOUSE, Pursuer.—*Jeffrey—Cockburn—Maitland.*  
M. GILFILLAN and SPOUSE, Defenders.—*Moncreiff—Cuninghame.*

*Lis alibi Pendens.*—An action of damages for slander before an Inferior Court, found a sufficient defence against an action of the same nature, subsequently brought in the Court of Session.

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1st DIVISION.  
Lord Meadowbank.  
H.

BROWN having brought an action of damages against Gilfillan and his wife on the ground of slander, it was pleaded in defence, that an action precisely of the same nature had been previously raised before the Commissary of Glasgow, and therefore that this action was incompetent in respect of *lis alibi pendens*. To obviate this defence, Brown presented a bill of advocacy of the Inferior Court process ob contingentiam. The bill having been forthwith passed, and Gilfillan having complained to the Court, the letters were recalled as irregular. (See ante, Vol. II. No. 612.) Against this judgment Brown entered an appeal. In the mean while Gilfillan and his wife presented a complaint to the Court, stating that the summons of damages had been framed in such a manner as to be evidently intended as a calumnious libel; and that it had been circulated extrajudicially by the agents for Brown and other parties to a great extent, and praying for interdict, and for exhibition and delivery of the copies so circulated. The Court sustained the complaint against all the parties except the agents, as to whom they sisted procedure until an action of damages should be brought. (See ante, Vol. III. No. 18.) This having been done, Gilfillan and his wife moved the Lord Ordinary to make avizandum to the Court with the original summons of damages, in order that the whole case might be before the Inner House. This, however, his Lordship refused to do, 'in respect the defenders refuse to pass from 'the plea of *lis alibi pendens*.' Against this judgment they re-

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2d DIVISION.

A. B. Pursuer.—*M'Cormick.*

HIS CREDITORS, Defenders.

*Cessio Bonorum.*—Process of *cessio* incompetent at the instance of a debtor liberated, in default of aliment, before expiry of a month's imprisonment.

A DEBTOR having been liberated, in default of aliment being lodged under a process for the benefit of the Act of Grace, before the expiry of a month from the date of his imprisonment, the Court refused to hear his *cessio* stated.



med, and contended that they were not bound to pass from defence, and that the appeal could not affect it, because the real related not to that defence, but to whether or not the acts of advocacy had been regularly obtained. To this it was answered, that the validity of that defence was necessarily involved in the appeal, because, if the judgment should be reversed, the advocacy found regular, the Inferior Court process should thereby be removed to the Court of Session, and conjoined, with the action there depending. The House of Lords having affirmed the judgment, the Court altered the intimation of the Lord Ordinary, sustained the defence of his petitioners, dismissed the action, and remitted the summons in instance against the agents to the Jury Court.

W. GUTHRIE,—A. P. HENDERSON,—Agents.

G. SMELLIE and Others, Petitioners.—*Bell—Ritchie.*

No. 131.

D. WILKIE, Respondent.—*Wilson.*

*Act—Sequestration.*—Circumstances in which a complaint against a party acting as clerk of a sequestration for having concurred in an application for a protection to the bankrupt, was dismissed.

THE estates of Inglis and Robb having been sequestrated under the bankrupt act, a competition took place for the office of interim factor. Wilkie acted as clerk at the meeting, and the creditors unanimously authorized him, 'as clerk to the sequestration, to apply to the Court for a personal protection to the bankrupt James Inglis, for such a length of time as the Court may be disposed to grant.' An application was accordingly made by him, and a protection granted till the 1st of May 1825. In the mean time a contest took place for the office of trustee, and Wilkie, at the request of the bankrupt, gave him a letter of concurrence, referring to the authority previously granted; and an application, accompanied by this letter, was thereupon presented for a renewal of the protection. This was intimated in ordinary form, and no objection being made, the protection was renewed till the 9th of August. Smellie and others, creditors on the estate, then presented a petition and complaint against Wilkie, alleging that although he had authority to apply for the first protection, yet he had none to concur in the application for a renewal. To this Wilkie answered, that in consequence of the contest for the offices of factor and trustee, the creditors had devolved the interim management upon him, and had authorized

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H.

him to get a protection for the bankrupt for as long a period as the Court would grant it; that although there was no express authority to apply for a renewal, yet it was necessarily implied, as matters still remained in their original situation; and that, at all events, he had acted in *bonâ fide*, and had made special reference to the authority under which he gave his concurrence, leaving to the Court to judge of its validity. The Court dismissed the complaint, and found him entitled to expenses.

A. ROBERTSON, W. S.—W. MERCER, W. S.—Agents.

No. 132.

R. B. BLYTH.—*Bell—W. Bell.*

J. BAIRD.—*Moncreiff—Jameson—A. Wood.*

Competing.

*Sequestration—Trustee.*—Held,—1.—That it is not a relevant objection to the vote of a creditor for a trustee that the claim is suspicious, and that, on investigation, it will be found false and fictitious, the requisites of the statute being complied with;—and, —2.—That it is irrelevant to allege that the voter has an interest adverse to the other creditors.

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H

THE estates of John Thomson having been sequestrated under the bankrupt act, a competition took place for the office of trustee between Blyth and Baird. The only person who voted for Blyth was Scott, the trustee on the sequestrated estate of Robert Guthrie; but the amount of his claim was £1795, while the total amount of the debts of those creditors who voted for Baird was only £795. Against Scott's vote Baird objected, that there was sufficient written evidence produced to show that the claim on which Scott founded (which was an account between Guthrie and the bankrupt) was false and fictitious; that it was also proved that these two persons had been guilty of rearing up fraudulent claims against the estates of each other, with a view to cheat their creditors; and he therefore contended, 1. That the vote of Scott ought to be rejected, on the ground that the claim was disproved by satisfactory written evidence; and, 2. That as Scott had an interest to resist an investigation into this suspicious claim, he ought not to be permitted to nominate the trustee. To this it was answered, 1. That the claim was supported by production of an account and affidavit of verity by Guthrie, and of credulity by Scott, and must therefore be sustained to the effect of entitling Scott to vote for the trustee; and, 2. That it was not relevant to object to the vote of a creditor on the allegation that

he had an interest to resist an inquiry into his claims, and that it was adverse to that of the other creditors; that it could not be alleged that Blyth was under the influence of any such interest, or that he was so situated as to be under the controul of Scott; and that although Scott was the only voter, yet, as his claim exceeded that of all the others, Blyth was duly elected in terms of the statute. The Court, on advising a report by the Sheriff of Fife, and hearing parties at the bar, sustained 'the vote given in 'the competition by Mr. Scott as a good vote; reserving the 'question whether the alleged interest on the part of Mr. Scott 'be sufficient to bar his voting for the appointment of a trustee 'on the estate of John Thomson,' as to which they appointed memorials to be given in; and thereafter, on advising them, they repelled this objection, confirmed Blyth, and found him entitled to expenses.

**LORD PRESIDENT.**—The Court cannot go into an investigation of the validity of the claim at the present stage. The requisites of the statute have been complied with, and therefore it must be sustained to the effect of affording a good vote. There is no allegation that Blyth has an interest adverse to the creditors, or that he is so situated as that he can be at all influenced by any personal interest in the performance of his duty. Had Scott voted for himself, the case would have been different; but it must be presumed that Blyth will perform his duty. Scott must vote for somebody, and there is no personal objection against Blyth.

**LORD BALGRAY.**—In sustaining the vote, no decision is pronounced on the validity of the claim;—that remains for investigation at a subsequent period. There is, however, some difficulty from Scott being the only voter for Blyth; but there is no personal objection against the latter.

**LORD CRAIGIE.**—The circumstances are extremely suspicious; and in such cases the Second Division is in the practice of appointing a third person as trustee, where there are objections to the two competitors. This course ought to be followed on the present occasion, for there seems no distinction between Scott electing himself and appointing Blyth.

**LORD GILLIES.**—The Court has no power to appoint a trustee; that belongs to the creditors, who are the electors. There is a material distinction between an objection to a voter, and an objection to a trustee as being personally interested. The circumstance of the voter having an interest adverse to that of the other creditors cannot prevent him from voting for the trustee; and the Court cannot presume that, from that circumstance, the trustee will violate his

duty. In the present case, indeed, Scott has no personal interest, because he is not the proper creditor, but is only a trustee on another sequestrated estate.

*Blyth's Authorities.*—2. Bell, 873. 380; Wilson, March 11. 1815, (F. C.); 2. Bell, 899, (note); Furlong, Feb. 1809; Grant, Sum. Sess. 1817; Brown, Feb. 4. 1819, (F. C.); Murray, June 22. 1821, (ante, Vol. I. No. 104); Paterson, Jan. 15. 1812, (F. C.)

*Baird's Authorities.*—2. Bell, 400; Campbell, July 11. 1805; M'Tavish, Nov. 13. 1824, (ante, Vol. III. No. 204.)

G. TODD jun.—MACK and WOTHERSPOON, W. S.—Agents.

No. 133. W. FULTON, (LOVE's Trustee,) Pursuer.—*Bell—Shaw.*  
J. LEAD, Defender.—*Greenshields—Moucreiff.*

*Stat. 1696, c. 5.—Bankrupt.*—1.—Whether it is a relevant allegation to elide a reduction of a bond, on the ground of being granted in security of debts to be contracted, that an obligation was given to pay the contents of the bond on production of a search of incumbrances, and delivery of a recorded sasine.—2.—Whether such sasine be equivalent to delivery.

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1st Division.  
Lords Eldin  
and Medwyn.

S.

ON the 26th February 1821, Love granted an heritable bond in security to Lead for £1400, and on the same day sasine was taken, but it was not recorded till the 2d of March thereafter. The estates of Love having been sequestrated, Fulton the trustee brought an action of reduction; alleging that although the bond had been granted for £1400, yet Lead had only paid £600, and accepted his bill for £200; that, quoad ultra, the bond was intended as a security for debts to be afterwards contracted, and was therefore to that extent liable to be set aside on the act 1696, c. 5. In defence it was stated, that, at the date of the execution of the bond, it had been arranged between the parties that the balance of £600 should remain in Lead's hands until a search of incumbrances was produced, and the recorded sasine delivered to him; that an obligation for payment of that sum, on that condition, had been granted; and that, on receiving delivery of the sasine duly registered with the bond, he had paid that sum to Love. To this it was answered, 1. That there was no evidence of the allegation, and that it was not relevant, seeing that the obligation was not pure and unqualified, but was subject to a condition; and, 2. That the recording of the sasine was of itself sufficient delivery, and no payments had been made till a considerable time thereafter. Lord Eldin assolizied the defender; but Lord Medwyn recalled that interlocutor, and after finding that

only £800 were advanced at the date of the bond, and that the balance was not paid till the 12th of June thereafter, found 'the allegations that, at the time of signing the bond, an obligation was granted by the defender, and delivered to the bankrupt, obliging himself to pay what remained to make up the sum in the bond on a search of incumbrances being produced, and separatim, that the bond was not delivered to the creditor till the full amount was paid up, sufficient to elide the challenge, on the ground that the bond was granted for subsequent contractions;' and appointed the parties to state whether there was any objection to a remit to the Jury Court to ascertain the truth of these averments. Fulton having reclaimed, the Court recalled the interlocutor, and remitted to the Lord Ordinary, before answer, to appoint Lead to give in a special condescendence of the nature of the obligation alleged to have been granted.

*Pursuer's Authorities.*—3. *Ersk.* 2. 44; *Pickering*, Jan. 16. 1788, (1155); *Dempster*, June 13. 1750, (14813.)

*Defender's Authorities.*—2. *Bell*, 247; *Dunbar's Creditors*, July 30. 1789, (*Bell's Cases*, p. 57); *Maxwell*, Jan. 21. 1828, (*ante*, Vol. II. No. 128.)

A. NAIRNE,—W. A. MARTIN, W. S.—Agents.

J. FAIRBAIRN, Pursuer.—*Stark.*

No. 134.

W. SCOTT, Defender.—*Graham Bell.*

*Cessio Bonorum.*—1.—Want of books not per se a sufficient ground for refusing benefit of cessio to a petty illiterate dealer.—2.—Creditors having stated charges vaguely in their papers,—circumstances in which Court will not delay determining the question of cessio, to enable them to state them more specifically.—3.—Party having obtained cessio at end of session, liberated, on caution to return to prison, if interlocutor reclaimed against.

FAIRBAIRN, the pursuer of a cessio, an illiterate man, and a petty dealer in grain, purchasing small quantities which he took to market to sell in his own cart, was opposed chiefly on the ground that he had kept no books. Other charges were brought forward against him, but these were stated so vaguely, that the Court would not take them into consideration; and holding the objection of want of books to be insufficient in the circumstances of the case, and the pursuer having been ten months in prison, they refused to allow a condescendence of these charges at so late a period of the session, but granted the cessio; and thereafter the creditors having notified their intention to reclaim, the Court granted warrant for liberation, on the pursuer finding caution, to the extent of

July 8. 1825.

2d DIVISION.  
M'K.

No. 137.

A. GREENHILL, Advocate.—*Moncreiff—Christison.*D. ALLAN and Others, Respondents.—*Baird—Boswell.*

*Servitude.*—Where a servitude is expressly defined in titles, the proprietor of the servient tenement is not entitled to contravene the restrictions, on the ground that he is permitted to do something else more injurious to the dominant tenement.

July 8. 1825.

2d Division.

Lord Mac-  
kenzie.

B.

GREENHILL was proprietor of a house, with a small area attached, at the corner of St. David and Queen streets, Edinburgh, under titles which bound him, for the purpose of 'pre-  
'serving light, air, and prospect' to the neighbouring tenements, not to erect any buildings on his area, except 'one or more little  
'houses, a stable, or any other small buildings,' not to exceed a certain height, 'for the convenience of his dwelling-house.' Having applied to the Dean of Guild for warrant to erect on the area buildings for shops, not to exceed the restricted height, he was opposed by Allan and others, proprietors of neighbouring houses for which the servitude was constituted, who alleged that the proposed buildings did not come within the exception in Greenhill's titles, not being offices for the convenience of his dwelling-house. To this it was answered, that as he could confessedly erect buildings of a more annoying character, they had no interest to oppose the erection of shops; and that servitudes being of strict construction in law, he could not be prevented from making any use of his property which did not interfere with the objects for which the servitude was expressly constituted, viz. the preservation of light and air. The Dean of Guild refused the warrant, and the Lord Ordinary and Court remitted simpliciter.

LORD ALLOWAY thought that the respondents had no proper interest to object to the proposed buildings; but the other Judges were of opinion that no buildings could be allowed, but those excepted from the general restriction in the titles.

CARNEGIE and SHEPHERD, W. S.—R. STUART,—Agents.

J. HENDERSON, Pursuer.—*Forsyth.*

No. 138.

J. ROWAT, Defender.—*Baird.*

THE only question here was, whether Rowat should, before answer, give in a special condescendence of certain counter claims made by him in an action of count and reckoning at the instance of Henderson. The Lord Ordinary appointed him to do so; and the Court adhered.

July 9. 1825.

1st Division.

Lord Eldon.

D.

J. SINGER, W. S.—J. GRAINGER, W. S.—Agents.

J. GRAY, Advocate.—*Gillies.*

No. 139.

W. EWING, Respondent.—*Grant.*

THIS was a question of expenses. The Lord Ordinary found them due to neither party, and the Court adhered.

July 9. 1825.

1st Division.

Lord Eldon.

D.

A. GRAY, W. S.—CAMPBELL and MACK, W. S.—Agents.

ALEX. M'LEAY, Suspender.—*A. Wood.*

No. 140.

D. THOMSON, Changer.—*Skene—Marshall.*

*Compensation.*—Circumstances in which a plea of compensation was repelled.

WILLIAM M'LEAY having, in 1783, been appointed judicial factor on the estate of Sinclair of Bridgend during the dependence of a ranking and sale, various sums of money were received by him; but although repeatedly ordered to produce his accounts, and to consign part of the funds, he failed to do so. Sinclair having died, and the ranking and sale being terminated, his daughter Miss Sinclair was onrmed executrix-dative to him. Various claims were made against her by creditors of her father who had not appeared in the ranking and sale; and in 1801 she instituted an action of count and reckoning against M'Leay. After a great deal of procedure, Miss Sinclair died, leaving a trust-disposition in favour of Thomson for behoof of one Rose; and a submission was then entered into between M'Leay and his son, the suspender, as cautioner, on the one hand, and Thomson, as trust-dispensee of Miss Sinclair, on the other. In 1822 a decree was pronounced against the two former for £701. 17s.; and M'Leay the father being now dead, a charge was given on this decree to his son. Of this he brought a suspension on various

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grounds, but chiefly that he had paid large sums to the children of Rose, (who was also dead,) in whose favour the trust had been made by Miss Sinclair, and that therefore he was entitled to plead compensation. To this it was answered, 1. That such a plea was not competent in a suspension of a decret-arbitral; 2. That the claims were illiquid, and could not be constituted in a suspension; and, 3. That there was no mutual concurrence, because the sum charged for belonged to the creditors of the late Mr. Sinclair, the trust-disposition being by an executrix-dative; that it was only in the event of there being a residue that the children of Rose could have any claim against Thomson, and that such a claim merely afforded to them a right of action. The Lord Ordinary found the letters orderly proceeded, and the Court adhered.

*Charger's Authorities.*—3. ERK. 4. 19; Cunningham and Co. Jan. 17. 1809, (F. C.); Syme, Feb. 24. 1747, (8075); M'Dowall, Feb. 6. 1824, (ante, Vol. II. No. 640); Grierson, Feb. 28. 1780, (759); Douglas, June 29. 1796, (18113); Wilson, May 3. 1809, (F. C.)

D. HORNE, W. S.—D. and A. THOMSON, W. S.—Agents.

# No. 141.

Captain M. M'Leod, Advocate.—J. M'Donald.  
J. N. M'Leod and Others, Respondents.—Jeffrey.

*Process.—Advocation.*—Not competent to advocate a process merely in modum probationis, where no alteration of the Inferior Court judgment is craved.

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Lord Medwyn.  
F.

CAPTAIN M'LEOD having, in virtue of a decree obtained by him against one Morrison, poinded a number of cattle, M'Leod of M'Leod, Morrison's landlord, and Mrs. Margaret M'Leod, his mother-in-law, applied to the Sheriff for an interdict against the sale—the one on the ground of an existing sequestration at his instance, and the other on the ground that the cattle were her property. These processes were conjoined; and, after a good deal of procedure, the Sheriff recalled the interdicts which had in the mean time been granted, and renewed the warrant of sale under the poinding. The expenses, however, of pasturing the cattle during the discussion having greatly exceeded the price for which they were sold, Captain M'Leod raised an action in this Court against M'Leod the landlord, as being personally liable in payment of Morrison's debt; and in order to produce evidence of the procedure in the Inferior Court, he presented a bill of advocation of the conjoined process of interdict, ob contingentiam. The Lord Ordinary, 'in respect that this bill does not pray for



'an alteration of the judgments pronounced in the Inferior Court, nor does it allege that any alteration ought to be made on them when this cause is advocated,' refused it; and stated in a note— 'The complainer has mistaken his remedy here. He will not be deprived of the evidence to be derived from the proceedings before the Sheriff; but the proper mode is by production of the extracted decree obtained by him; or, if it has not been extracted, he may get from the Lord Ordinary before whom the new action comes to depend, a warrant to transmit the Inferior Court proceedings in modum probationis.' The Court refused a petition without answers.

C. McDONALD, W. S.—J. and C. NAYNE, W. S.—Agents.

J. GENTLE, Suspender.—*Gordon.*

No. 142.

M'LELLAN and COMPANY, Chargers.—*Maidment.*

*Master and Servant.*—Summary warrant of imprisonment a competent mode of enforcing performance of a contract of service.

GENTLE, a journeyman coachmaker, engaged to work with M'Lellan and Company, coachmakers in Glasgow, for two years from April 1824, and he bound himself during that time to instruct an apprentice. This latter obligation he evaded, but worked with M'Lellan and Company till March 1825, when, on receiving a sum from Pentland, a coachmaker in Perth, he engaged with him. After this he began to get drunk, and to absent himself from M'Lellan and Company; he concealed that he had spoiled a pannel of a coach, which afterwards proved defective, became insolent, and finally left their work. M'Lellan and Company then applied, under the 4. Geo. IV. c. , to the Justice of Peace of Lanarkshire, who ordained him to return to his service, and sentenced him to thirty days imprisonment as a punishment for his conduct. After remaining in prison twenty-eight days, M'Lellan and Company allowed him to be liberated, on his agreeing to instruct their apprentice, and allow 10s. weekly to be retained from his wages in security of his conduct. Pentland then applied for a warrant to have Gentle ordained to enter into his service, according to his engagement with him; and Gentle admitting his willingness to do so, the warrant was granted, and Gentle sent off to Perth. This, however, was recalled at the instance of M'Lellan and Company, who also enforced their former warrant, and had him brought back to Glasgow, to undergo the

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two remaining days of imprisonment under it, and immediately obtained a warrant at common law, on the ground of desertion of service, for imprisoning Gentle till he should find caution to return. This having been granted and executed, Gentle presented a bill of suspension and liberation, on the ground that a summary warrant of imprisonment was incompetent in a civil process, and that there was an irregular combination of civil and criminal procedure. The Lord Ordinary having verbally reported the bill, it was unanimously refused.\*

The Court, holding the imprisonment complained of to be solely on the warrant in the civil process, were unanimously of opinion, that while the judgment in *Bisset* (May 15. 1810, F. C.) must be held to be a just decision, and not to be deviated from, it did not apply to the present case, which fell to be regulated by the principles of the judgment of the First Division in *Raeburn v. Reid*, (ante, Vol. III. No. 73); and in these their Lordships expressed their entire concurrence.

No. 143.

A. CUTHILL, Suspender.—*R. Thomson.*

J. MONTEATH, Charger.—*Jameson.*

*Bill of Exchange—Proof.*—Whether competent, in a suspension of a charge on a bill of exchange, to prove non-onerosity by a scrutiny into the holder's private books.

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Lord Cringletie.

B.

CUTHILL having been charged by Monteath on a bill of exchange accepted by him, brought a suspension, alleging that the bill was for Monteath's accommodation, and offering to prove this by the books of Monteath, and a company of which he, Monteath, and another person were partners. A condescendence of his averments having been lodged, the Lord Ordinary, in respect that the proposed mode of proving them 'would involve a count and reckoning, containing a scrutiny, not only of the books of the company, but of the private books of Mr. Monteath, which the Lord Ordinary sees no ground for permitting in the course of a charge on a liquid document of debt,' repelled the reasons of suspension. Cuthill having reclaimed, the Court 'of consent' allowed an inspection of Monteath's books at the sight of a commissioner; but that not confirming Cuthill's allegations, they refused his petition, without prejudice to a reference to oath.

J. MOWBRAY, W. S.—CAMPBELL and MACDOWALL,—Agents.

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\* No papers.

A. FERGUSSON, Suspender.—*Robertson.*

No. 144.

GORDON, BATT, and COMPANY, Chargers.—*Cunninghame.*

*Bill of Exchange.*—Not a relevant defence in an action for payment of a bill at the instance of onerous indorsees against the acceptor, that they were aware of the acceptance being for the drawer's accommodation, or that they had postponed discussing the drawer.

GORDON, BATT, and COMPANY, bankers in Belfast, as indorsees of three bills discounted by them, drawn by Farrell upon and accepted by Fergusson, raised action for payment against the latter, who alleged in defence, that the bills in question were accepted by him for Farrell's accommodation; that Gordon, Batt, and Company were aware of this when they discounted the bills; and that they had concurred in a trust-deed by Farrell, whereby they agreed to supersede diligence against him till a sale of part of his property should be effected. The Lord Ordinary repelled the defences, and stated in a note as his reasons, '1. There is no evidence that the bills were for accommodation of Farrell, and it cannot be proved by any diligence. 2. The allegation is no way relevant, since it is not even hinted that the pursuers are not onerous indorsees. 3. The pursuers giving time to Farrell, supposing it true, is not relevant. They are not bound to do diligence against, nor demand payment from the drawer of the bills.' The Court refused a petition without answers.

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F.

J. STUART,—

—Agents.



# THE CASES

DECIDED IN

THE COURT OF SESSION,

WINTER 1825-6.

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R. DOWNIE and Others, Suspenders.—*Jeffrey—Cockburn—* No. 145.  
*Christison.*

EARL OF MORAY, Changer.—*Dean of F. Cranstoun—Bruce.*

*Public River—Nuisance.*—Held that an heritor who had fenced his lands for buildings was entitled to discharge the sewage water into a neighbouring public river, and that the inferior heritors could not object to this as a nuisance, or as depriving them of the use of the water; but that this was to be done in the manner least offensive or injurious to them.

LORD MORAY fenced his lands of Drumsheuch, situated in the immediate neighbourhood of Edinburgh, and within a short distance from the water of Leith; and a great many houses having been erected, of which the inhabitants exceeded 3000, he proposed to form a common sewer from the buildings, and to discharge the impurities into the channel of the water of Leith, a little below Stockbridge. With this view he began to dig a main drain, but was stopped by a bill of suspension and interdict presented by Mr. Downie of Appin and others, proprietors of houses at Stockbridge. Against the formation of this drain they objected, 1. That as the contents of it were to be discharged into the river at a part which formed the centre of the village of Stockbridge, it would be a nuisance, particularly during the summer months, when there is scarcely any water in the river; and, 2. That as they were heritors on the banks of the Leith, and were, with their tenants, accustomed to use the water for domestic purposes, they had a right to resist any contamination of the water. In support of the first of these objections, they stated, that during the dry season of the year there was scarcely any water in the channel of the river; and that, consequently, the filth which would be discharged from so populous a district would remain deposited, and would create an intolerable nuisance. With regard to the second

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objection, they alleged that they and their tenants were in the practice of making use of the water for cooking, for washing and bleaching clothes, for watering horses, &c. ; and that, in particular, one of them derived an income of £200 a year from rents paid by washerwomen and others who inhabited the banks, and employed the water in the cleaning of clothes ;—and they contended, in point of law, that as the primary use of running water is for domestic purposes, a superior heritor is not entitled either to appropriate the water itself, or to pollute it so as to render it unserviceable, and thereby deprive the inferior heritors of the use of it. To this it was answered, 1. That rivers are the natural vehicles for conveying to the sea excrements and other noxious things, and that, from the situation of the houses, the water of Leith was the proper receptacle for the impurities which might be discharged into it ; 2. That, accordingly, all the sewage water from the greater part of the New Town, and also from part of the Old Town of Edinburgh, was conveyed into the Leith ; and that if it was occasionally dry during the summer, this arose from the greater portion of the water having been taken out of the channel, and carried in another direction by an artificial aqueduct,—a circumstance which could not affect Lord Moray's legal rights. Lord Eldin, Ordinary on the bills, passed the bill, and continued the interdict, ' in respect that the project ' of the respondent (Lord Moray) for conducting the foul water ' and filth from the numerous buildings now erecting on his property at Drumsheuch by a tunnel or drain, to be emptied into ' the water of Leith, is evidently destructive of the comfort of ' the inhabitants in that neighbourhood, as the water of Leith, ' into which the drain or tunnel is proposed to be emptied, is a ' very small stream, (the great body of its water being drawn off ' by the mill-dam,) and the stream so diminished is fitted for domestic purposes, but would be rendered totally useless for such ' purposes by the impurities of the tunnel or drain, if they should ' be admitted ; and that the respondent has not given a reasonable ' account of any means that could be taken to prevent the issue of ' such foul water or filth from being a nuisance, and that he does ' not deny that his object in making the drain or tunnel is to send ' down the water from the said buildings to the water of Leith, ' and that he does not allege that he had any other object.' The Court, however, recalled the interlocutor, and remitted to pass the bill, and continued the interdict, ' in so far only as regards the ' opening or using of the drain.' The case having thereafter come before Lord Mackenzie, he remitted it to the First Division of contingentiam of another case which depended there ; and that

Court, on advising memorials, found, 'That the Earl of Moray 'is entitled to empty the drains from his new buildings into the 'channel of the water of Leith,' and removed the interdict; but remitted 'to Messrs. Robert Stevenson and Jardine, engineers, 'to consider and report in what manner this right can be exercised with the least possible detriment to the complainers' property.' These gentlemen having reported that they were of opinion that the drain might be discharged into the river about eight yards further down than the bridge at Stockbridge, with as little injury to the property of the suspenders as was possible, the Court approved of the report, and to that effect found the letters orderly proceeded.

**LORD PRESIDENT.**—The natural place into which the impure water is to be discharged, is that which nature points out; and here, independent of every other consideration, it naturally flows down the hill on which Lord Moray's buildings are situated, into the river; but the river is the proper receptacle of the impurities of the town, which will be washed away and carried to the sea by means of floods; and even if they are not so, the inconvenience thence arising must be endured by those whose houses are on the banks.

**LORD CRAIGIE.**—Lord Moray is entitled to make the same use of the river, as if his property were actually at the river-side; and, at common law, he is entitled to throw into its channel the filth from the houses.

**LORD BALGRAY.**—In all great towns the inhabitants must be allowed the means of discharging their fulzie into a neighbouring public river, which is the natural mode of carrying it off. If any inconvenience is occasionally experienced in this particular case from want of water, it arises from a great part of it having been allowed to be directed into an artificial channel, but which circumstance cannot affect Lord Moray's legal rights.

**LORD GILLIES.**—I cannot concur in the doctrine which has been so broadly laid down as to public rivers; but while I am of opinion that Lord Moray is entitled to discharge the impure water, &c. into the river, I think he is bound to do so in the manner which is the least injurious, and the least offensive to the heritors on its banks.

In this qualification the other Judges concurred, and the remit to engineers was accordingly made for that purpose.

*Suspenders' Authorities.*—*Charity*, July 5. 1808, (No. 6. App. Pub. Pol.); *Kelso*, July 1. 1768, (12807); *Ogilvie*, Nov. 24. 1791, (12824); *Miller*, Nov. 1791, (Bell's Cases, 334 and 12823); *Glenlee*, March 10. 1804, (12824.)

*Chargers' Authorities.*—1. *Mack. Works*, p. 25; *M. of Berwick*, July 1. 1661, (12772); 2. *Enk.* 9. 9.

**W. RENNY, W. S.—J. WAUCHOPE, W. S.—Agents.**

No. 146.

J. WADDEL, Suspender.—*Brownlee*.J. MORTON, Charger.—*W. Bell*.

*Judicial Admission.—Triennial Prescription.*—A messenger having received a sum of money for a creditor who employed him, and an action having been brought against him by the creditor for payment more than three years thereafter, and he having admitted the receipt of the money, but alleged that he had paid it to the creditor—Held,—1.—That he was bound to prove the alleged payment;—and,—2.—That the triennial prescription did not apply.

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1st Division.

Bill-Chamber.

Lord Craigie.

In 1816 Waddel, a messenger, was employed by Morton to recover from Merry £5: 15: 8., which he accordingly did, and granted his receipt for the amount. For payment of this sum Morton brought an action in 1824 against Waddel before the Sheriff of Lanarkshire. In defence, Waddel admitted that he had received payment of the money from Merry, but he alleged that he had immediately paid the amount to Morton, without taking any receipt; and he pleaded, 1. That as Merry's receipt could afford no evidence that he was owing a debt to Morton, the latter could only take the admission subject to the qualification with which it had been made; and 2. That at all events the claim was prescribed by the lapse of more than three years. The Sheriff having decerned in terms of the libel, and the decree having been extracted, Waddel presented a bill of suspension, which the Lord Ordinary refused, 'In respect it is admitted by the complainer that he granted to James Merry a written receipt for the sums for which he has been charged; and further, in respect that the obligation arising from the receipt in these circumstances does not fall under any of the short prescriptions.' The Court refused a petition without answers.

W. WADDEL, W. S.—

—Agents.

No. 147.

D. COOPER, Suspender.—*A. McNeill*.J. YOUNG, Charger.—*Cuninghame*.

*Process.*—A bill of suspension having been presented during vacation without caution, and one Ordinary having passed it, but another having passed on caution—Held that the bill was not to be considered as passed simpliciter.

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Bill-Chamber.

Lord Medwyn.

D.

COOPER presented a bill of suspension and interdict without caution or consignation, and Lord Eldin pronounced an interlocutor passing it. As, however, two Judges were necessary, the case was laid before Lord Medwyn, who passed it on caution. Against this judgment Cooper reclaimed, and contended that as the bill was presented without caution, it was not competent to



annex this condition, and therefore the bill must be held to have been passed simpliciter. The Court refused the petition without answers.

*Suspender's Authority.*—A. S. Aug. 10. 1776.

J. MACDONELL, W. S.—W. WADDEL, W. S.—Agents.

SANDBACH and COMPANY, Pursuers.—*M'Neill*.

No. 148.

J. CALDWELL, Defender.—*Gillies*.

*Process.*—Circumstances in which it was held, that although an Englishman had resided more than four months in Scotland prior to the execution of a summons against him as furth of Scotland, he could not object to this as irregular.

CALDWELL, a native of England, and whose usual residence was at Bolton-le-Moor, Lancashire, contracted a debt to Sandbach and Company of that town, who, having learned that he had funds in Scotland, employed an agent in Edinburgh to attach them. An arrestment jurisdictionis fundandæ causâ was accordingly executed; and on hearing of this, Caldwell caused his agent in Edinburgh to address a letter to the agent of Sandbach and Company, requesting a state of the debt, which he accordingly did, but did not expressly mention that Caldwell was in Scotland. The debt not having been paid, Sandbach and Company executed a summons against Caldwell as being furth of Scotland. In defence he objected, that he had resided in Edinburgh for upwards of four months previous to the execution of the summons, and that it was therefore irregular. To obviate this objection, Sandbach and Company executed a new summons; and Caldwell having insisted that the first ought to be dismissed, the Lord Ordinary repelled the objection, and conjoined the two summonses, in respect it is 'admitted that the defender is an Englishman, and designs himself, late cotton-manufacturer in Bolton-le-Moor, Lancashire.' That although it is averred by him that he came to Scotland, and took up his residence in Edinburgh in the month of February last, and that he was resident there when the said summons was executed upon the 5th day of June last, yet that this fact was not known to the pursuer or his mandatory, who accordingly raised letters of arrestment in order to found a jurisdiction against the defender, as not being a native of nor resident in Scotland, and consequently not subject to the jurisdiction of any Court therein; and that this was known to the defender's agent, to whom a state of the debt was rendered in order to a settlement, who nevertheless allowed the pursuer to proceed in error to libel and execute the said first

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‘ summons founded on the arrestment laid on to found the jurisdiction, and to execute the same as furth of Scotland, whereby a delay of five months was occasioned, and the pursuer might have lost the benefit of arrestments used upon the dependance; whereas, if the pursuer had been informed of the defender’s place of residence in Edinburgh, the said first summons, which contained in the will an alternative warrant to cite the defender personally or at his dwelling-place, if within Scotland, might have been executed against him any time before the summons was called in Court, and the second summons been thus rendered unnecessary.’ To this interlocutor the Court, on the same grounds, adhered.

J. THORBURN, W. S.—T. SMALL, W. S.—Agents.

No. 149.

J. WYLLIE, Advocate.—*Sol.-Gen. Hope—Forbith.*

Miss H. ROSS and Others, Respondents.—*Moncreiff—More.*

*Legacy.*—Legacies directed by a defunct to be paid by a party to whom the greater part of his property was gratuitously disposed, and declared to be a burden on the succession, held not to be revoked by the deceased having entered into a contract of excambion of the property so burdened, and not evaded by the repudiation of the donee, and his taking up the succession under another gratuitous disposition from the heir of the deceased.

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2d Division.

Bill-Chamber.

Lord Eldon.

M.K.

THE late Mr. Ritchie, by a deed of settlement executed in 1793, disposed to Wyllie certain heritable subjects and a tack of the farm of Cargill, declaring, ‘ That the said James Wyllie, by acceptance hereof, shall be bound, and the subjects before disposed are expressly burdened with the payment’ of certain legacies, and, inter alia, £200 to each of the respondents. This deed contained neither precept nor procuratory, and before his death Ritchie had assigned the tack of Cargill, reserving to himself a surplus rent of £80, and had also entered into a contract of excambion, (the terms of which were settled by a decret arbitral,) whereby he became bound to exchange all the property disposed to Wyllie (with the exception of two small tenements) for the lands of Airleywight belonging to Lord Mansfield, and the sum of £2,200. In terms of this contract, he and Lord Mansfield entered into possession of the respective properties exchanged, but no dispositions were executed. On Ritchie’s death in 1805, Mrs. Wyllie, his heir-at-law, (the advocate’s mother,) exped a general service, and completed her titles by infeftment under precepts of clare constat to the properties which Ritchie had become bound to convey to Lord Mansfield. She then, in implement of the contract, disposed these properties to his Lordship, and received

from him a disposition to the lands of Airleywight, which, within three months thereafter, he conveyed gratuitously to Wyllie, who professed to have repudiated Ritchie's settlement in his favour. Mrs. Wyllie died in 1819; and in 1821 the respondents raised an action before the Sheriff of Perthshire against Wyllie, concluding for payment of the legacies left to them in Ritchie's deed of settlement, on the grounds that they were entitled to payment by Wyllie of the legacies with which Ritchie had burdened his succession;—1. Because Wyllie's mother, the heir-at-law of Ritchie, having taken up the succession, thereby subjected herself in payment of these legacies, and the same obligation must attach to Wyllie as her gratuitous disponee; and, 2. Because Wyllie had incurred a representation to Ritchie by drawing the surplus rents of the farm of Cargill, and £200 for ameliorations from the landlord at the expiry of the lease. In defence, Wyllie pleaded, 1. That Ritchie must be held to have revoked the settlement in 1798 *rebus et factis*; and, 2. That it was only by his acceptance under that deed that he could be burdened with payment of the legacies, and that, as he had taken no benefit under the deed, he was not liable for them; and he denied having intromitted with any of Ritchie's succession, so as to have incurred a passive title. The Sheriff allowed a proof as to the disputed facts, on advising which, he found 'it sufficiently instructed that the defender did receive from James Duncan, to whom the deceased 'in his own lifetime assigned or subest the said tack, additional 'rents payable by him for the same; and that finally he received 'from the proprietor £200, being the amount of the last year's 'rent, stipulated to be allowed for ameliorations;—that the fore-'said deed of settlement is the only title that has appeared, un-'der which the defender was entitled to act; and being in the 'knowledge of that deed, he must be held to have accepted and 'acted under it;—and he accordingly repelled the defences, and decerned in terms of the libel. The Lord Ordinary refused a bill of advocacy, and the Court adhered.

The Court were unanimously of opinion, that independent of the representation, which formed the ground of the Sheriff's judgment, and which they considered to be satisfactorily established by the proof, there were sufficient grounds for subjecting Wyllie, as his repudiation could not evacuate the legacies, for which he was clearly bound in law, having obtained the succession, burdened with them, by a gratuitous title; and it was observed, that as the deed of settlement contained no procuratory nor precept, no other proceedings could have been adopted for completing Wyllie's titles,

had he expressly and openly availed himself of the deed, than the steps which were followed.

*Advocator's Authorities.*—3. Ersk. 9. 10; Inst. 2. 21; Dig. 1. 21. de Lib. Legat.; Lockhart, July 31. 1767, (6370); Wauchope, July 3. 1724, (8063.)  
*Respondents' Authority.*—3. Ersk. 8. 51.

A. FORSYTH and G. MACDOWALL,—A. GIFFORD,—Agents.

No. 150.

D. BROWN, Pursuer.—*Cockburn*—*Napier*.

HERITORS OF KILBERRY, Defenders.—*Moncreiff*—*Hunter*.

*Jurisdiction*—Stat. 43. Geo. III. c. 54.—*Schoolmaster*.—Held,—1.—That the Court of Session has jurisdiction to review and set aside the proceedings of a presbytery in the trial of a schoolmaster under the above statute in point of form, where they exceed their powers, although review is excluded;—and,—2.—That it is an excess of powers, where the statute requires the necessary proof to be taken, not to put the proof in writing.

Nov. 15. 1825.

1st Division.

Lord Medwyn.

H.

By the statute 43. Geo. III. c. 54. relative to the Schoolmasters of Scotland, it is enacted, 'That when any complaint from the heritors, minister, or elders against a schoolmaster, charging him with neglect of duty, either from engaging in other occupations, or from any other cause, or with immoral conduct, or cruel and improper treatment of the scholars under his charge, shall be presented to the presbytery, they shall forthwith take cognizance of the same,—serve him with a libel, if the articles alleged appear to them to be of a nature which requires it,—and having taken the necessary proof, they shall acquit or pass sentence or censure, suspension or deprivation, as shall appear to them proper upon the result of such investigation; which judgment shall be final without appeal to or review by any Court, civil or ecclesiastical.' And it is further provided, that in case sentence of deprivation shall be pronounced, the schoolmaster shall be ejected from the school and school-house by a warrant of the Sheriff, 'of which no bill of suspension, nor advocation, nor action of reduction, shall be competent.' In virtue of this statute, the heritors of the parish of Kilberry presented a complaint to the presbytery of Kintyre against Brown, the parish schoolmaster, containing various accusations, and sentence of deposition was pronounced against him. Of this he brought a reduction on the ground, inter alia, that the proof which had been adduced had not been committed to writing. This was admitted; but it was pleaded in defence, 1. That the action was incompetent, because it was declared by the above statute that the sentence of the presbytery should be final, and not subject to review; 2. That the Court of Session had no jurisdiction to review the proceedings of an Ec-

denistical Court; and, 8. That it was not necessary to take the proof in writing, more especially as the judgment could not be reviewed. To this it was answered, that the presbytery were bound to proceed according to the ordinary forms of law, with which the statute did not dispense; and that as they had omitted to take the proof in writing, they had exceeded their powers; and consequently the action was competent, and the Court of Session had jurisdiction to the effect of restraining any excess of power.

Lord Alloway, before whom the case originally came, found that although 'by the statute 43. Geo. III. c. 54. sect. 21. 'the judgment of the presbytery is declared to be final, without 'appeal to or review by any Court, civil or ecclesiastical; yet, if 'the proceedings upon which judgment was pronounced were contrary to law, or if that Court exceeded their powers committed 'to it by the statute, they might be reviewed and set aside in 'this Court;—that it is required by the section of the statute 'founded on, that the presbytery take the necessary proof;—that 'it was necessary, according to the forms of proceeding in 'Church Courts, that the proof should be taken on oath;—that it 'is admitted by both parties that the proof was taken upon oath;— 'that any proof taken upon oath must be authenticated by the 'subscriptions of the witnesses, if they be able to subscribe, and 'by the subscription of the moderator;—and that the defenders 'had founded upon no statute by which this rule of law can be 'dispensed with in the proceedings of a presbytery, and there is 'no such dispensing power in the statute in question;—that, on 'the contrary, the 23d section of the statute expressly reserves 'the former rules of procedure, in so far as not expressly authorized to be departed from by that act. Therefore, as the depositions of the witnesses were not taken down in writing, nor 'duly authenticated, and the extract of the proceedings of the 'presbytery produced is totally deficient in these respects,' his Lordship reduced and decerned in terms of the libel. It having, however, been afterwards explained that great avizandum had not been made, and that it was incompetent to decern in the reduction, he recalled the decerniture, but sustained the action as competent, repelled the defences, and adhered quoad ultra. To this interlocutor the Court adhered, 'in respect that the findings 'in the Lord Ordinary's interlocutor complained of by the petitioners relate merely to the question of the competency of the 'action, and the making great avizandum therewith to the Court;' and thereafter remitted to Lord Medwyn to discuss the reasons of reduction. His Lordship, conceiving himself 'tied up by 'the findings in the interlocutor of Lord Alloway, which were

'adhered to by the Court, though specially asked to be recalled, and that the competency should be simply sustained,' reported the case to the Court, who reduced and decerned in terms of the libel.

**LORD PRESIDENT.**—We did not recal the findings of Lord Alloway, because they had reference to the competency of the action, and they were certainly not binding on the Lord Ordinary before whom the reasons of reduction were to be discussed. On the merits there can be little doubt. There is here a libel, but no proof. By the rule of the common law, it is necessary that the proof should be put in writing; and on this rule no alteration is made by the statute. Besides, the statute expressly declares that the schoolmaster shall only be subject to the penalties there provided, 1. For neglect of duty; 2. For immoral conduct; or, 3. For cruel and improper treatment; and it appoints the presbytery to serve him with a libel, and to take 'the necessary proof.' The powers of the presbytery are therefore limited to certain charges, and they are required to take the necessary proof. But the necessary proof must be that which is required by law, which is just in other words enacting that the proof shall be in writing. Having failed to obey this part of the statute, the presbytery have committed an excess of powers, and their proceedings are consequently subject to the review of this Court. Suppose, for example, that the presbytery had tried the schoolmaster on a charge which was not warranted by the statute, such as that he was not qualified to teach the bagpipes or dancing, this would be an excess of powers, even although there was a written proof. But how is it possible to know what the subject-matter was, if it be not expressed in writing? It is no doubt true, that if the presbytery confine themselves to the statute, and are right in point of form, we have no jurisdiction to review their proceedings. We are entitled, however, to prevent them from deviating from the statute; and where review is cut off, it is just the more necessary that an Inferior Court should be kept tight in point of form.

**LORD HERMANN.**—I am of the same opinion. There are many examples of the interference of the Court in regard to the militia and turnpike statutes, where any excess of powers has been committed.

**LORD CRAIGIE.**—I have great doubts as to the competency of the action, and the jurisdiction of the Court. Considerable difficulty has been experienced by several of the Judges on a similar question in the Second Division. Prior to the statute, this Court was not entitled to judge even as to points of form arising in ecclesiastical cases. The power of reviewing belonged to the synod and other supreme Church Courts; but the object of the statute was to prevent such review, and accordingly it expressly declares that there shall be 'no

appeal to or review by any Court, civil or ecclesiastical.' Independent of this, however, the pursuer is barred from objecting to the irregularity of the procedure, because he himself led evidence, and did not require that it should be put in writing. Besides, if this sentence be reduced, the pursuer cannot be tried over again, seeing that the charge against him was of a criminal nature.

**LORD BALGRAY.**—It is undoubted that we cannot review the judgment on the merits; but there is a supereminent power in this Court to keep all the Inferior Courts to their duty. If they go beyond their powers, we are entitled to set aside their decrees, even although review be excluded. Now in this statute it is expressly required that there shall be the 'necessary proof;' but if the proof be not expressed in writing, it is not that which is necessary by law; and, besides, it would be impossible to convict any of the witnesses of perjury.

**LORD GILLIES.**—This action is competent, because the proceedings of the presbytery are irregular, and our jurisdiction arises from the inherent power which exists in this Court to prevent Inferior Courts from acting illegally, and committing injustice. Suppose that the libel had been at the instance of the heritors of a different parish, and that sentence had been pronounced in consequence of it, could we not have arrested its execution? I apprehend that we could. But here there has been an irregularity equally as great, and the pursuer has been deprived of advantages which lawfully belong to him. He might have been able to redargue the proof, or he might have shown that the witnesses were perjured; but this he is unable to do, as there is no written evidence in existence.

**THE LORD PRESIDENT** observed, in reference to what had fallen from Lord Craigie, that the Court did not mean to express any opinion as to the competency of trying the pursuer a second time.

*Purmer's Authorities.*—Heritors of Corstorphine, March 10. 1812, (F. C.); Young, June 28. 1814, (F. C.); 1693, c. 22; 1696, c. 18; 2. Hume, 268; 2. Pardov. sect. 14; Act of Assem. April 18. 1707; Robb, Nov. 19. 1824; (ante, Vol. III. No. 218.)

*Defenders' Authorities.*—(1.)—Chivas, July 11. 1804, (No. 12. App. Jurid.)—(2.)—1567, c. 11; Book of Policy, c. 9. § 10; Spottiswoode, 297; 1581, c. 1; 1592, c. 16; 1690, c. 5; 1707, c. 6; Kames' Stat. App. No. 2; 1683, c. 5; 1662, c. 4; 1693, c. 22; 1. Ersk. 5. 24; 1. Pardov. 5; Macculloch, Dec. 17. 1793, (7471); Act of Assem. June 3. 1799, and May 28. 1809; 1. Hume, 42; Robertson, Aug. 11. 1780, (7465); Macqueen, July 23. 1781, (7466 and 7469.)

**D. M. BLACK,**—GIBSON and OLIPHANT, W. S.—Agents.

No. 151.

D. WALLACE and Others, Suspenders.—*McGacken*.H. GRANT and Others, Chargers.—*Shaw*.

*Process*.—Held that a bill of suspension having been refused with expenses, and a subsequent one passed, but the decree for expenses not having been brought under the review of the Inner House, was final and effectual.

Nov. 15. 1825.

2d Division.

Bill-Chamber.

Lord Medwyn.

M'K.

WALLACE and others presented a bill of suspension, which was refused during vacation, with expenses. A second bill was also refused; but a third bill was passed on caution, (see ante, Vol. III. No. 369.) The decree for expenses was not brought under review of the Inner House; and diligence having been raised on it, Wallace and others presented a bill of suspension, on the ground that it was superseded by the passing of the third bill. To this it was answered, that by the A. S. 19th December 1778, the Lord Ordinary had no power to review the decree for expenses, and that this could be done only by the Inner House within five sederunt days after the meeting of the Court; and that as this had not been done, the decree was final. The Lord Ordinary refused the bill, and the Court adhered.

J. PATTISON Jun. W. S.—C. FISHER,—Agents.

No. 152.

J. STEIN and Others, Pursuers.—*Buchanan*.T. GRAHAM STIRLING, Defender.—*Rutherford*.

*Harbour*.—Held,—1.—That the proprietor of a public harbour is not bound to expend more than the dues received in keeping it in repair, nor to assign them to a third party who offers to keep it up;—but,—2.—That if any obstructions have arisen from acts of his own, or neglect to expend the dues on the harbour, he must be at the expense of removing them.

Nov. 15. 1825.

2d Division.

Lord Glenlee.

M'K.

MR. GRAHAM STIRLING held a charter of the public harbour of Airth, situated in a small inlet from the Frith of Forth called the Pow of Airth. This inlet was left dry at low water; and a reservoir had at one time been constructed, which was regularly filled by the flood-water, and suddenly let out by opening a sluice, when the tide had ebbed, for the purpose of carrying away the mud which was deposited by the flood-tide. The resort to the harbour having so much decreased that the shore-dues were not sufficient to pay a person for attending to the sluice, this practice was given up in 1804, from which time the harbour was no longer resorted to. Mr. Graham Stirling about the same time erected a stake and rice fence across the mouth of the inlet; and he made embankments on the verge of it; whereby he took in a considerable portion of land from the shore. The inlet having



in a few years become very much choked up with mud, Stein, the proprietor of a distillery in the neighbourhood, raised an action to have it declared that Mr. Graham Stirling was bound to put and maintain the harbour in a complete state of repair, and that he should be ordained to desist from any operations which might obstruct the public from using it as a harbour; or alternatively, (as concluded for in an amendment of the summons,) that he, Stein, should be allowed to repair it at his own expense, and, on doing so, should be entitled to levy the dues till he was thereby repaid such expenses.

After some procedure, and the cause having been reported by the Lord Ordinary, the Court found, 'That the defender is not bound to expend upon the reparation of the harbour more than the amount of the revenue arising from it, nor to grant an assignation to the pursuer of the shore-dues as craved, and in so far assoilzie the defender; but find that the defender is not entitled, by an opus manufactum, to injure or deteriorate the natural means of cleansing the harbour; and also find, that in so far as the obstructions of the harbour may have been produced either by any of the operations performed by the defender, or by his neglect to employ the bygone shore-dues towards the reparation thereof, he is still bound to remove such obstructions at his own expense.' Thereafter, on the report of an engineer, the Court ordained the stakes to be removed; but not being satisfied that the accumulation of mud had been produced by the defender's operations, or that he had neglected to employ the bygone shore-dues towards its reparation, they found that there were no grounds for any further decerniture against him.

GIBSON-CRAIGS and WARDLAW, W.S.—J. DUNDAS, W.S.—Agents.

J. DUNLOP, Petitioner.—*Cunninghame*.

R. SPEIR, Respondent.—*Shaw*.

No. 153.

*Execution pending Appeal—Interest on Expenses*.—A party craving execution pending appeal good expenses, not entitled to demand interest on them, and only allowed the expense of extract, in the event of their not being paid within a certain short period.

IN an application for execution, so far as regarded expenses, pending the appeal of the case, ante, Vol. IV. No. 74, Dunlop prayed for the interest of the expenses from the date of decerniture, and also the expense of extracting the decree. The Court granted execution in common form, but refused the claim for interest, and allowed the expense of extract in the event only of the expenses not being paid within three weeks.

R. DUNLOP, W.S.—W. PATRICK, W.S.—Agents.

Nov. 15. 1825.

2d Division.  
F.

No. 154.

JAMES BRYSON, Pursuer.

ROBERT AYTOUN, Defender.—*Marshall.*

*Triennial Prescription.*—The constitution and non-payment of a debt being admitted, the plea of the triennial prescription not admissible.

Nov. 16. 1825.

1st Division.

Lord Eldon.

D.

BRYSON, a surgeon in Hamilton, brought an action in 1823 against Aytoun, concluding for an account of medicines and attendance terminating in 1817. This was resisted on the ground, 1. That the claim was subject to the triennial prescription, (but the constitution and the non-payment of the debt was admitted); and, 2. That the charges were extravagant. The Lord Ordinary, after remitting to Mr. Gillespie, surgeon in Edinburgh, to examine the account, and having received his report, decerned in terms of the libel. Aytoun reclaimed, repeating his defences, and alleging that an account different from the one libelled on had been laid before Mr. Gillespie. The Court refused the petition as to the defence of prescription, but remitted to the Lord Ordinary again to remit the account to Mr. Gillespie; and thereafter to do as should be just.

ANDERSON and WHITEHEAD, W. S.—LINNING and NIVEN, W. S.—  
Agents.

No. 155.

Mrs. GRAHAM or BROWN, Suspender.—*Maidment.*JAMES BENNIE, Charger.—*Sandford.*

Nov. 16. 1825.

1st Division.

Lord Eldon.

S.

This was a question as to the import of an oath of reference in a suspension and interdict, and resolved into a question of fact. The Lord Ordinary suspended the letters, and the Court adhered.

G. LANG,—D. M'GOWN,—J. B. WATT,—Agents.

No. 156.

MAGISTRATES of MONTROSE, Petitioners.—*Ivory.*

J. MILL, and P. CROOKS, W. S. Respondents.

*Process—Execution pending Appeal—Summary Application.*—A party having paid expenses, pending appeal, to the opposite agents, without requiring a bond of caution to repeat, the Court, on a reversal, granted warrant for repetition, on a summary application to that effect.

Nov. 16. 1825.

2d Division.

F.

THE Magistrates of Montrose having entered an appeal in the case mentioned ante, Vol. III. No. 618, the Court, in granting interim execution, allowed decree for the expenses awarded in favour of Mill to go out in name of Crooks, his agent, who received the amount from the agents of the Magistrates on his simple re-

ceipt, without any bond of caution to repeat in the event of a reversal being required. The judgment of this Court having been reversed by the House of Lords, the Magistrates presented a petition to apply the judgment; but overlooking the circumstance that no bond of caution had been required to be lodged, they prayed in the usual form for warrant of delivery of the bond, that they might operate repayment of the expenses. Warrant in common form was granted accordingly; but Mr. Crooks having declined to repay the expenses, the Magistrates presented a summary application, directed against him and Mill his client, praying the Court to amend their interlocutor, so as to ordain them directly to repeat the amount of expenses formerly paid. No appearance was made for Crooks or his agent, and the Court granted the prayer of the petition.

GIBSON-CRAIG and WARDLAW, W.S.—Agents.

ADAM CORRIE, Suspendee.—*Whigham.*

No. 157.

JAMES BARBOUR, Changer.

*Process.*—Form of reclaiming notes under the statute 6. Geo. IV. c. 120.

CORRIE presented a reclaiming note against a judgment of the Lord Ordinary passing a bill of suspension of a vitiated bill on caution. He stated the history of two previous charges under the same diligence,—that poindings had been executed, and briefly submitted, in the form of argument, that this being a third charge, and the bill being vitiated, the suspension ought to be passed. The Court refused to receive the note in this shape, and appointed it to be amended.

Nov. 17. 1825.

1st Division.

Bill-Chamber.

Lord Medwyn.

D.

In relation to this and several other reclaiming notes, the Court stated that they ought to contain no argument whatever;—that, in Bill-Chamber cases, the nature of the bill was not to be fully explained, but merely expressed in brief terms, as, for example, that it was a charge on a vitiated bill;—that, in all reclaiming notes, the name of the Ordinary whose judgment was complained of should, for the convenience of the Court, be mentioned at the top of it; and they refused to allow answers to be given in where the Lord Ordinary had adhered on a representation without answers, and ordered the case forthwith to the roll.

B. WELSH,—W. DALRYMPLE,—Agents.

No. 158.

WILLIAM M'DOWALL, Suspende.  
WILLIAM MILLIGAN, Changer.—*Pyper*.

*Heritable Creditor—Power of Sale.*—Interdict, till a title was made up, granted against a party claiming right by conveyance to an heritable bond, with a power of sale, and who had intimated his intention to sell.

Nov. 17. 1825.

1st DIVISION.  
Lord Eldin.  
D.

M'DOWALL granted an heritable bond and disposition in security to Mrs. Milligan, who by a deed of settlement conveyed it to her children, and nominated William Milligan and Charles Moreland to be their tutors and curators, and authorized them to sell any part of the subjects over which the bond extended, when they saw fit to do so. After her death, Milligan having given notice that he meant to sell the subjects, M'Dowall presented a bill of suspension and interdict, on the ground that Milligan had not made up a title to the bond; that he had therefore no authority to discharge the debt; and that he had not complied with the statute 1672, c. 2. as to making up inventories. The Lord Ordinary suspended the letters, and declared the interdict perpetual; but the Court so far altered, on advising a petition without answers, as to declare the interdict to be only in hoc statu.

R. WELSH,—W. MERCER, W. S.—Agents.

No. 159.

Mrs. CLARK, Pursuer.—*Dean of F. Cranstown—D. Dickson*.  
J. L. NEWMARCH, and J. GRANT, W. S. Defenders.—*Bell—Shaw*.

*Decree in Foro, or in Absence—Mandatory.*—Circumstances in which it was held,—1.—That a decree was liable to be opened up, although appearance was repeatedly made for the defender, and judgment pronounced on the merits, it being alleged that she had not been fully heard in consequence of poverty, and that the action was incompetent; and,—2.—That a mandatory in that action was liable for the expenses of a process of reduction, although he disclaimed the character in that process.

Nov. 17. 1825.

1st DIVISION.  
Lord Medwyn.  
D.

IN 1746, Alexander Trapaud, a native of England, came to Scotland, and was appointed Governor of Fort Augustus. He married a Scotch lady in Scotland, and, during the subsistence of the marriage, a legacy of £600 was left to Mrs. Trapaud by a Mrs. Campbell, who died in England. After residing in Scotland for 50 years, Mr. Trapaud died without issue of this marriage, leaving his whole effects (subject to certain provisions in favour of his wife) to his daughter by a prior marriage; and, on her decease, the defender Mr. Newmarch succeeded to her. Thereafter Mrs. Trapaud also died, having bequeathed every thing which she possessed to her two sisters, Mrs. Clark and Mrs. Grant. A dispute having taken place between these two ladies and Mr.

Newmarch as to their respective rights to the legacy of £600, it was arranged that in the mean time joint measures should be adopted to recover the amount from a Mr. Robinson, the executor of Mrs. Campbell, and that it should thereafter be remitted to a bank in Edinburgh. A bill was accordingly filed against the executor in the Court of Exchequer in England by Mrs. Clark and Mrs. Grant, in consequence of which the money was realized, and was placed in the hands of a Mr. Bowyer, with the view to be eventually sent to Scotland. In the meanwhile Mrs. Grant had given up her claim to this fund in favour of Mr. Newmarch; but Mrs. Clark having insisted on payment of it to herself, Mr. Newmarch lodged a caveat in Exchequer to prevent any warrant to that effect going out; and an order was pronounced by the Court for hearing parties on this subject. In order to determine the matter of right, Mr. Newmarch brought a process of multiplepinding, in name of Bowyer, before the Court of Session; but it was dismissed as incompetent. He then, along with Mr. Grant as his mandatory, raised an action in 1815 against Mrs. Clark, (who resided in Scotland,) concluding that she should be ordained either to concur in authorizing Mr. Bowyer to remit the money to Edinburgh, or that she should be ordained to count and reckon in relation to this and other claims. The summons was taken out to see, and it was returned with printed defences, in which, besides denying that she was liable to account, she contended that the action was incompetent;—that the question had been decided in England;—and that, accordingly, an order of Court had been there made for payment to her of the money. The case was then debated, and Lord Craigie appointed Mr. Newmarch to state the grounds of his action in a condescendence, and Mrs. Clark to answer, and the respective parties to reply and duply. A condescendence was accordingly lodged, and Mrs. Clark gave in answers, extending to sixty-five pages of manuscript, and arguing the whole case. The process then fell asleep; but it was awakened in 1818, the summons having been served personally on Mrs. Clark, and having been taken out by her to see, and thereafter returned. Replies were lodged by Mr. Newmarch, and an order was issued by Lord Reston, (who was now Ordinary in the cause,) that the money should in the meanwhile, and without prejudice to the rights of parties, be remitted to Sir William Forbes and Company. This, however, was not carried into execution; and after repeated orders on Mrs. Clark to give in duplies, Lord Cringletie pronounced a long and special interlocutor, in which, after mentioning that no duplies had been lodged, and repelling certain objec-

tions to Mr. Newmarch's title, he found, ' That Mrs. Dorothy Campbell left to Mrs. Trapaud a legacy of £600, which became due in the Governor's lifetime, and of course fell under his *jus mariti*; and that this sum not having been recovered by him or his widow, her said executors took out letters of administration, as executors under her will, and after much litigation recovered from George Robinson, the residuary legatee of Mrs. Campbell, a decree from the Court of Exchequer in England against him, whereby the said legacy, interest, and expenses, were paid into Court, and that a moiety of said sum, which is now claimed by the pursuer, was paid over to William Bowyer, one of the clerks of Exchequer, as attorney for the defender Mrs. Clark, in whose hands it now remains: That the decree of Exchequer was not intended to decide that this money was the property of the defender in a question with the pursuer, as such question was never stirred, the purpose of the action being simply to recover payment from Robinson, who denied that he was liable for it; and consequently the payment obtained by this decree is to be considered in no other light than if Robinson had voluntarily paid the money to the defender, and she had deposited it in the hands of Mr. Bowyer: That if the money had been paid to the defender, it would have been competent to the pursuer to have demanded it from her, as being part of the estate of Governor Trapaud; and consequently, as it is admitted that the money is in Mr. Bowyer's hands, for behoof of those having interest in it, there is nothing unreasonable or incompetent in the pursuer demanding a decree against the defender, to the effect of her granting an order on Mr. Bowyer to pay that money to the pursuer; and therefore approves of the interlocutor pronounced by the late Lord Repton on the 19th February last, which seems to be final; and on this subject decerns against the defender in terms of the libel.' He then assolizied Mrs. Clark from another claim, and found no expenses due to either party. This interlocutor became final; and about eight months thereafter Mrs. Clark lodged a minute, signed by counsel, entering on the merits of the case, and stating that she had been unable, from poverty, to give in duplies. On advising that minute, and a motion by Mr. Newmarch, the Lord Ordinary granted warrant ' to Mr. Bowyer to pay the money in his hands to the pursuer on his single discharge, and decerne.' This warrant was extracted; and within a few months thereafter Mrs. Clark was placed on the poor's roll, and lodged another minute, praying to have all the interlocutors recalled, in respect of a clerical blunder made by the messenger in his execution of the

summons of wakening. Lord Cringletie refused to do so, in respect she had made appearance without objection, and the warrant for payment of the money had been extracted, so that it could not be reviewed in this shape.

Mrs. Clark then raised an action of reduction against Mr. Newmarch, and to which she called Mr. Grant as a party. In support of this action she contended, 1. That the original one was incompetent, seeing that the question had been decided in the Court of Exchequer. 2. That the decree had passed in absence at a time when she was unable, from poverty, to make appearance. 3. That although the summons was dated and signeted on the 20th of January 1818, yet the execution indorsed on it was dated 21st January 1817. 4. That the legacy being payable out of a fund situated in England, where the testatrix resided, and Mr. Trapaud having been originally an Englishman, the question on the merits was to be decided according to the law of England, by which the legacy belonged to his wife, in consequence of its not having been realized during his lifetime; and, 5. That Mr. Grant was responsible in this process for the consequences of the judgments in the prior one. To this it was answered by Mr. Newmarch, 1. That the Court had no jurisdiction over him, as he resided in England; 2. That, at all events, the judgments which had been pronounced in the previous action were decrees in foro, and therefore formed a *res judicata*,—seeing that appearance had been regularly made,—the case judged of on the merits,—and that the objection to the competency had been proponed and repelled. 3. That the plea of poverty was not relevant to open up a decree in foro; and that it was proved by the record that the allegation was not true, because she had appeared subsequent to its date, both by agent and counsel. 4. That the error in the execution was plainly a clerical mistake; and, at all events, she had appeared and pleaded on the merits without objection. 5. That the legacy, having vested in Mrs. Trapaud during the marriage, belonged to her husband *jure mariti*, and had been conveyed by him to Mr. Newmarch; and, 6. That Mr. Grant could not be responsible as mandatory in this new process.

Lord Medwyn assaizied, ‘in respect the interlocutor sought to be reduced in this process was not an interlocutor in absence.’ Mrs. Clark having reclaimed, the Court ‘altered the interlocutor of the Lord Ordinary reclaimed against, repelled the plea of *res judicata*, sustained the reasons of reduction, and reduced, decerned, and declared accordingly, to the effect of allowing the petitioner to be heard for her interest in the action in which the

‘interlocutors and decrees pronounced were sought to be reduced; and remitted to the Lord Ordinary to hear parties both upon the competency of that action, and also upon the merits of the same;’ and found her entitled to expenses. To this interlocutor they adhered, by refusing a petition, without answers.

In pronouncing the above judgment, the Judges were chiefly influenced by the proceedings in England, and by the allegation of Mrs. Clark that she was in poverty at the time when she ought to have lodged duplies. Several of them thought that the action in England, and the circumstance of the fund and of the executor being there, rendered the process at the instance of Mr. Newmarch incompetent; nor did they put any weight on the circumstance that this defence had been proponed and repelled; or that Mrs. Clark had appeared by counsel and agent at the period when she alleged she was in poverty. With regard to the liability of Mr. Grant, they held, that although he had disclaimed the character of mandatory in the first paper which was lodged by him and Mr. Newmarch, yet he was responsible. And it was observed by the LORD PRESIDENT, that although he was agent for Mr. Newmarch, he ought not to have caused appearance to be made for him without a mandatory.

LORD BALGAY also stated, in reference to the merits, that he considered the case of Egerton to have been incorrectly decided.

*Pursuer's Authorities.*—(3.)—Millie, Nov. 27. 1801, (12176); Leith, June 27. 1822, (ante, Vol. I. No. 518); White, Nov. 18. 1819, (not rep.); 1. Enk. 9. 4.

*Defenders' Authorities.*—(2.)—Stair, p. 564. § 6; 1672, c. 16. § 19; Phillip, Dec. 29. 1692, (12192); Craig, Jan. 29. 1735, (12195); Goldie, Jan. 13. 1778, (12195); Blair, July 23. 1739, (12196); Baillie, Nov. 26. 1766, (12210); Hunter, Jan. 18. 1806, (not rep.); Handyside, Nov. 16. 1805, (not rep.); Sands, Jan. 15. 1806, (not rep.)—(5.)—Egerton, Nov. 27. 1812, (F. C.); Greenhill, June 24. 1824, (ante, Vol. III. No. 121.)

D. BLACKIE, W. S.—J. GRANT, W. S.—Agents.

No. 160.

Mrs. JACKSON, Pursuer.—*Jardine.*

J. JACKSON, Defender.—*A. Wood.*

*Parent and Child—Aliment—Process.*—Held,—1.—That an obligation on the part of a son to aliment his mother, is not implemented by an offer to receive her into his house, unless the son be unable to afford a separate maintenance; and,—2.—That aliment is due from the date of a summons in the Sheriff Court, although it had been held incompetent so far as regarded a permanent aliment.

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2d Division.  
F.

AFTER the decision of the case mentioned ante, Vol. III. No. 407, Mrs. Jackson raised a summons of aliment in the Court of Session against her son. It was admitted that she was upwards



of 90 years of age, and had no means of subsistence, and that although the son had a family of his own, yet he was in good circumstances; but he pleaded as a preliminary defence, that he was willing to take his mother home to his own house, and could not therefore be obliged to pay a separate aliment. In support of this plea he contended, that the obligations of children and parents as to this matter were in every way reciprocal and equal; and at all events, that as his mother had always lived in an inferior rank of life, (his father having been a small farmer,) the amount of aliment ought to be very moderate. On the part of Mrs. Jackson it was answered, that the father's right to insist that his children should live in house with him, if he alimented them, arose from his patria potestas, whereby he was entitled to exercise a control over their mode of life, which could never be claimed by a child over its parent; and as to the amount of aliment, that the son's circumstances were such as to afford a respectable maintenance to his parent. The Court repelled his preliminary defence; and on considering a condescendence, with answers, as to his means, awarded a separate aliment of £100 per annum from the date of citation in the original action at Mrs. Jackson's instance.

**LORD GLENLEE.**—I have no idea that, in a question between a son and his mother, the son has the same rights as those which a father has, who aliment his children. The father is entitled to the services of his children, in so far as they are able to contribute to the support of the family generally. A child, however, has no such privilege as to his parent; and, except under very particular circumstances, the parent must have a separate aliment.

**LORD ROBERTSON** was not prepared to decide the case, without ascertaining more correctly the state of the defender's circumstances.

**LORD PITMILLY.**—The offer by a son to receive his parent into his own house is no discharge of the obligation to aliment, except, perhaps, where he is totally unable to give a separate maintenance. This is not alleged here, and the defence must therefore be repelled.

**LORD ALLOWAY.**—There can be no doubt on this case. If the defender had not means sufficient to give any separate aliment, it would be a question of circumstances, as in the case of Greig, where the judgment was quite right; for the only way in which the son there could aliment his mother, was by receiving her into his house. The present case is perfectly different, and a separate aliment must be allowed.

**LORD JUSTICE-CLERK.**—On the general point there can be no doubt. It is impossible to say that the cases of children and parents are parallel. The obligation to aliment is equal, but nothing else; and

as it is not alleged that the defender is unable to pay a separate aliment, the defence is untenable.

*Pursuer's Authorities.*—4. Puffendorf, 11. 4; 23. Montesq. 23. 1; 1. Blackstone, 16. 1; 1. Stair, 5. 6; 1. Ersk. 6. 56; Noble, July 14. 1627, (407); Finnie, Feb. 22. 1631, (406); Sibbald, Feb. 19. 1679, (407.)

*Defender's Authorities.*—1. Ersk. 6. 57; Greig v. Crawford, 1817, (not rep.)

MACK and WOTHERSPOON, W. S.—A. FLEMING, W. S.—Agents.

No. 161.

A. FORBES, Pursuer.—*Forsyth.*

Mrs. TOD, Defender.—*Cockburn—Hall.*

Sir P. WALKER, Defender.—*Whigham.*

*Clause.*—A party in a missive of feu of the stance of a house in a street, agreeing to be bound by the same regulations as to pleasure-ground, &c. with the other feuars, must take a charter with the same conditions as those inserted in the charters of the previous feuars.

Nov. 17. 1825.

2d DIVISION.

Lord Mackenzie.

B.

THE late Mr. Walker, father of the defender Sir Patrick Walker, in granting the first feus in Coates Crescent, Edinburgh, (in front of which there is an enclosed space of pleasure-ground,) inserted a clause in the different charters binding the feuars to pay a 'proportion of the expense which a majority of the feuars, 'with the consent of me and my foresaids, may find necessary 'for the purpose of keeping the pleasure-ground in order and repair.' After seven feus had been taken, and charters granted in these terms, Forbes agreed to feu a building-stance by missives, in which he bound himself 'to conform to the same rules and 'regulations as the other feuars in the Crescent as to the elevation, 'pleasure-ground in front,' &c. Forbes having thereafter erected a house on this feu, sold it to Mrs. Tod; and Sir Patrick became a party to the transaction by granting a letter obliging himself to deliver to Mrs. Tod a feu-right and disposition, 'conform to 'the missive of feu granted to Mr. Forbes.' Sir Patrick accordingly offered her a charter in terms similar to those granted prior to the date of the missive to Forbes; but this she refused to accept, unless that part of the clause relative to the expense of keeping the pleasure-ground in order, which required the consent of the superior, were omitted; and having also refused to pay the price of the house till she should receive a title without this provision, Forbes brought an action against her and Sir Patrick, concluding for implement of the missives above mentioned. The Lord Ordinary found, that there was 'no sufficient evidence that 'the special clause insisted upon by Sir Patrick was contained 'in any set of regulations or provisions which had been exhibited 'to the feuars of Coates Crescent, and agreed to by them prior to

'the time when the feu now held by the respondent was granted; and finds no necessity for, or reasonableness in this clause, which can put the respondent in mala fide to object to it in these circumstances;' and ordained Sir Patrick to grant a charter, by which he should only retain his controlling power till the whole stances were feued out. On a reclaiming petition, however, by Sir Patrick, the Court, 'In respect that there is nothing unreasonable, nor contra bonos mores, in the clause insisted for by the petitioner, and that the same is in terms of the agreement of parties, alter the interlocutors complained of, and find that the petitioner is entitled to have that clause inserted in the charter, and decern accordingly: Also decern and ordain the said Mrs. Archibald Tod to make payment to the said Alexander Forbes of the price of the house as libelled, with interest thereof, under deduction of such partial payments as she can instruct to have been made to account thereof.'

A. GOLDIE, W. S.—TOD and ROMANES, W. S.—Agents.

N. and A. McALLISTER, Advocators.

No. 162.

MARK SPROT, Respondent.—*J. W. Dickson.*

6. Geo. IV. c. 120.—Form of reclaiming notes under the new Judicature Act.

SEVERAL reclaiming notes, under the new form of process, were moved for the first time. Some of them contained a detailed narrative of the case, and of the procedure in the Inferior Court; some entered into argument on the cause, and others against judgments in the Bill-Chamber had bills of advocacy and suspension, or other documents, attached as appendices. All these the Court ordered to be withdrawn as irregular, reserving to the parties to present other notes in proper form.

Nov. 17. 1825.

2d DIVISION.

Bill-Chamber.

Lord Medwyn.

B.

The Court stated that these notes ought merely to state the general nature of the case with the utmost possible brevity; to recite the interlocutors of the Lord Ordinary reclaimed against, but not those in the Inferior Court, and to crave an alteration; and that representations and other papers, including the summons and defences required by the act of sederunt to be boxed, ought to be so along with, and attached to the note.

C. FISHER, —STUART and SPROTT, W. S.—Agents.

No. 163.

Rev. A. M'INTOSH, Claimant.—*Neaves.*INGLIS and WEIR, W. S.—*Matheson.*

*Sasine—Notarial Docquet.*—Held,—1.—That the omission in the notary's docquet to state that he was present with the witnesses, is fatal to the sasine;—2.—That mere bad grammar is not a good objection, if the meaning is plain;—and,—3. That a sasine by an heritable creditor, after the purchaser in a ranking and sale has been infest, is inept.

Nov. 17. 1825.

2d Division.

Lord Cringetie.

M'K.

IN a process of ranking and sale pursued by the son and heir of the late Mr. Innes, the Rev. Mr. M'Intosh claimed as an heritable creditor over certain subjects in the burgh of Tain belonging to the deceased. The instrument of sasine, (proceeding on an heritable bond,) which he produced in support of his claim, set out in usual form with stating, that 'in presence of me notary public, &c. and witnesses after named and subscribing, compared personally,' &c. It bore that the bailie delivered the heritable bond 'to me, to be read and published to the witnesses and others standing by; which I having accordingly done, he, in virtue thereof,' &c.; and concluded with stating, 'that these things were so said and done, &c. before and in presence of, &c. witnesses to the premises, specially called and required;' but the attestation that the notary was personally present with the witnesses was omitted in the docquet, which was in the following terms: 'Et ego vero Thomas Suter, clericus Edinburgensis dioceseos, clericus burgi de Tain, ac notarius publicus, auctoritate regali, et per Dominos Concilii et Sessionis, secundum tenorem Acti Parliamenti admissus: Quia præmissis omnibus et singulis sic fieri et dici vidi scivi et audiui, ac in notam cepi: Ideoque hoc præsens publicum instrumentum super hoc et duabus præcedent. paginis pergamenæ debite impressæ manu alienâ fideliter script. exinde confeci, ac in hanc publici instrumenti formam redegei; signoq. nominis et consuetis signavi et subscripsi in fidem, robur, et testimonium veritatis omnium et singulorum præmissorum rogatus et requisitus.' It was objected by Inglis and Weir, the common agents, that this instrument was null,—1. Because, after the words in the docquet, 'Quia præmissis omnibus et singulis,' the notary had omitted the usual words, 'dum sic, ut præmittitur, dicerentur, agerentur, et fierent, una cum prænominatis testibus præsens personaliter interfui, eaque omnia et singula præmissa sic fieri, &c.; and, 2. Because the manner in which the notary asserted his subscription, 'signo nominis et consuetis signavi,' was quite unintelligible and insufficient, and ought to have been 'signoque nomine et cognomine meis solitis et consuetis.' After the subjects had been judicially sold and the purchaser infest, Mr. M'Intosh caused a second infestment, in

every respect regular, to be taken on his heritable bond ; and to this it was objected that it was inept, in consequence of the purchaser's prior infeftment. Mr. M'Intosh did not allege that it was at all common in practice to frame docquets in terms similar to that in the present case ; but in answer to the several objections he pleaded, 1. That although the statement by the notary, that he and the witnesses were present, was necessary to the validity of the deed, yet the presence of the witnesses was sufficiently asserted in the body of the instrument, and the omission to repeat it in the docquet could not infer a nullity, and that his own presence was necessarily implied in the declaration that he saw and heard the acts performed which he narrated.—2. That *mala grammatica non vitiat cartam* ; and as to the new infeftment, —3. That there being no heritable creditors competing, the litigiousness occasioned by the process of ranking, and the infeftment of the purchaser, did not create such a mid impediment in a question with personal creditors, as to prevent him obtaining a preference on the price in virtue of his second infeftment.

The Lord Ordinary, 'in respect of the defects in the docquet of the first sasine, and in respect of the second having been taken after the purchaser was infeft,' sustained the objections ; and the Court, by a majority, adhered.

**LORD GLENLEE.**—If the decision in the case of Maxwell, quoted for the claimant, which seems to have escaped the notice of our institutional writers, be good law, the docquet in this case must be sustained. But that case can scarcely be followed as a precedent, —and it is taken for granted by all our writers, that whatever be the form of the docquet, the notary must assert the fact of his being present with the witnesses. The want of this is the great defect here ; and though it is a hard case, as the claimant was obliged to employ the town-clerk of the burgh as the notary, yet the instrument cannot be supported.

**LORD PITMILLY** concurred in thinking that it was impossible to sanction such an incorrect and slovenly mode of framing the docquet.

**LORD ALLOWAY.**—I at first thought that this instrument could not be sustained, but I now entertain great doubts of that opinion. Neither Craig nor Stair mention what are to be considered the essential parts of a docquet ; and there is no formula established, either by statute or act of sederunt. It is no doubt essential to the validity of the instrument, that the notary assert the witnesses to have been present ; but he has asserted this in the body of the deed, and they sign it as such ;—and what, then, is the necessity for repeating it in the docquet ? The presence of the notary himself is likewise essential ; but that is sufficiently asserted by his stating that he saw and heard what was done. As to the second

defect, it is doubtless very bad grammar; but the meaning is plain. The old case of *Maxwell* is very strong in favour of the present; and the three modern decisions, preceeding the A. S. 1756, when the statutory provision as to inserting the number of pages had been disregarded, are still stronger, and it seems impossible in the face of them to hold the present deed null.

**LORD JUSTICE-CLERK.**—With every inclination to get over the difficulty, on account of the hardship of the case, (the claimant having no choice of a notary,) I can come to no other conclusion than that the interlocutor is well founded. The later decisions alluded to by Lord Alloway were pronounced in consequence of an universal practice affecting the whole property of the country. But no such averment of practice is or can be made here; and the terms of the A. S. then passed are of much importance in fixing how essential the whole docquet is. I do not conceive that mere grammatical errors would form any ground of nullity. And as to the second objection, the word 'nominis' is probably merely a contraction for 'nominibus;' but it is essential that the notary should state in the docquet, not merely that he saw, &c. but that he saw in presence of witnesses. As to the case of *Maxwell*, now for the first time brought to light, unless the Court are prepared to go the whole length of it, which they never will do, it cannot be followed as a precedent; and, besides, the second part of the decision throws discredit on the whole judgment.

Their Lordships were unanimous as to the second assize being inept:

*M'Intosh's Authorities.*—2. Stair, 3. 19; 2. Craig, 7. 21; 2. Ersk. 3. 35; *Maxwell*, Jan. 1680, (16837.)

*Inglis and Weir's Authorities.*—*Lady Lamerton*, Jan. 1682, (14309); *Primrose*, Dec. 22. 1612, (14326); *Office of a Notary*, p. 27.

**JOSEPH GORDON, W. S.—INGLIS and WEIR, W. S.—Agents.**

**No. 164. G. A. FISCHER &c. Pursuers.—*Jeffrey—Fullerton—Murray.*  
EARL of SEAFIELD &c. Defenders.—*Moncreiff—Cockburn—Skene.***

*Legacy.*—A legacy having been bequeathed to foreigners, and which, in consequence of a dispute, was compounded in a foreign country for a specific sum, but which was agreed to be paid in this country, and full and ample discharges granted—Held that the legacy duty was a burden on the legacy so compounded, and that it was payable by the legatees.

Nov. 18. 1825.

1st Division.  
Lord Meadow-  
bank.  
H.

**THE** late Earl of Findlater, who resided in Germany, bequeathed various legacies and life rent annuities to his secretary Fischer, and his brothers and sisters, amounting together, with certain claims of debt, to upwards of £90,000. For payment of these

claims they raised several actions against his representative, the Earl of Seafield, before the Court of Session; and, in particular, Fischer instituted an action for payment of the legacies which had been bequeathed to him. These actions were resisted by Lord Seafield; but the chief discussion took place in the latter one, against which various defences in point of law were unsuccessfully pleaded. The Earl of Seafield, however, having alleged that the claims arose *ex turpi causâ*, the Court allowed a proof of this averment, and a commission was granted for taking it in Germany, to which country the respective counsel and agents, accompanied by a commissioner, forthwith proceeded. On their arrival at Dresden, and before the proof was taken, an agreement was entered into by the counsel and agent on each side, which was ratified by their constituents, and was in these terms: 'The counsel and agents above named having had some previous communication relative to a final settlement of the whole claims of the pursuers in the various processes above referred to, have this day agreed that all the said claims, and the processes themselves, shall be finally discharged by Mr. Fischer and the members of his family having any interest therein, in consideration of the payment after mentioned; and that full and ample discharges of all their claims, and of the said processes, shall be granted by them or their attorney, to be duly authorized to that effect; and that, in consideration thereof, the sum of £55,000 sterling shall be paid to them or their attorney by the defenders; which sum shall be payable at Edinburgh at the term of Martinmas next (1822), with interest from that date during the not-payment.'

When the parties came to settle in terms of this agreement, a dispute occurred as to the payment of the legacy duty; and the Earl of Seafield having retained £5000 in order to pay the legacy duty, or, what was the same thing, until a discharge duly stamped should be delivered to him, Fischer and others brought an action, concluding for payment of the £5000. In defence, the Earl of Seafield contended, 1. That the legacy duty is a burden on the legates, and the executor is entitled, in accounting, to deduct the amount of the duty from the legacy bequeathed; and the rule is the same in relation to a compounded legacy, which was the nature of the claim made by Fischer and others; and, 2. That, independent of this general rule, Fischer and others had bound themselves to grant a full and ample discharge, and had agreed to receive payment and grant the discharge at Edinburgh;—that the discharge was therefore to be according to

the law of this country, and that it could not be considered as effectual, unless it were written on a stamp corresponding to the amount of the duty. To this it was answered, 1. That the burden of paying the legacy duty was by law laid upon the executor;—that the legatee was only required to grant a discharge on unstamped paper;—and that it was incumbent on the executor to make it effectual to himself by getting it stamped;—2. That even supposing the rule were otherwise, the Earl of Seafield had bound himself to pay £55,000, in consideration of Fischer and others giving up a claim of upwards of £90,000, and that he was not entitled to retain any part of that sum;—and, 3. That an entry in the books of the Commissioners of Stamps, that the duty had been paid by the executor, was a sufficient discharge, so as to protect against any future claim by the Crown.—The Lord Ordinary found, ‘That, in the general case, either where legacies are to be paid in full, or where they have been compounded, and no express stipulation to the contrary has been made, the duties due thereon to the Crown constitute a burden on the bequest; and that the administrator of the settlement is by law entitled to retain a sum sufficient therefrom, to enable him to discharge the same;—that, by the deed of agreement libelled, no express provision was made for relieving the legacy bequeathed to the pursuer by the Earl of Findlater deceased, and as thereby agreed to be restricted and compounded, from the payment of the duties attaching to it by law;—that as the measure of the claims legally competent to the pursuer must be estimated by the extent of the same, as appearing from the said deed of agreement, and not by what they may have originally appeared, the circumstances of a great part of the latter having been abandoned and surrendered by the pursuer, can in law afford no ground for holding that it was an implied condition of the said agreement, that the burden of discharging the said duties should be transferred from him, and imposed upon the defenders;—that, therefore, the defender is only bound to pay over to the pursuer such parts of the sum retained as may remain after defraying the duties due to the Crown on the legacy payable to the pursuer, as restricted and compounded.’

Against this judgment Fischer and others reclaimed; and a doubt having been expressed on the Bench, whether duty was exigible on a legacy which had been bequeathed in a foreign country to foreigners, and which had been there compounded, the case was superseded till the point should be tried in the Court of Exchequer. Judgment having been there pronounced, finding



that legacy duty was exigible,\* the Court, 'found that the defendants are entitled, out of the £5000 libelled, to pay the legacy duty on the respective legacies; and to that effect, and in regard to that point, refuse the desire of the petition, and adhere to the interlocutor reclaimed against; and quoad ultra remit to the Lord Ordinary to proceed in the cause.'

**LORD HERMAND.**—The general rule is, that the legacy duty is payable by the legatee. Here there was a compromise, and the question is, whether the legatee has been relieved of the burden imposed on his legacy by law. A mutual agreement was made by the parties, the one binding himself to pay £55,000, and the other to grant 'full and ample discharges' in Scotland. But how can such a discharge be granted, if one available in law be not given? In order to be so, it must be duly stamped, which is just saying in other words that the amount of the legacy duty must be deducted.

**LORD BALGRAY.**—The question is, whether or not the £55,000 are to be paid, subject to the burden imposed on it by law, and on whom that burden falls. If the parties had agreed that the money was to be paid in Germany, and a discharge granted there, the full amount must have been paid. That, however, was not the agreement; for the pursuers became bound to receive the money, and to grant discharges in this country. The legacy duty, however, seems to have escaped the attention of both parties; and the question therefore is, which of them is to pay the legacy duty. Is Lord Seafield to pay £55,000, with the addition of the legacy duty; or are the pursuers to bear that burden? Now the rule of law is, that this burden lies on the legatee, or more properly on his legacy, and the practical mode in which it is arranged is, that the executor pays the legacy under deduction of the duty, and receives a discharge from the legatee on unstamped paper, which is transmitted to London, and there stamped, on payment of the le-

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\* The judgment, after mentioning that it was 'confined to the general question, whether the legacies by the testator to the foreigners resident in the foreign country of Saxony, particularly to the persons of the name of Fischer, in the special case mentioned, were, in the circumstances of the case, liable to legacy tax, and right being reserved, if necessary, to argue the question, whether certain of the claims of the Fischers were *mortis causa* donations liable to legacy tax or not, and whether the £55,000 of compromise, in the case mentioned, is in whole or in part to be applied to the legacies in this question of tax,' bears, that 'the Lord Chief Baron this day (15th July 1825) delivered the judgment of the Court on the general question argued—That legacy tax was due on the legacies to the whole foreigners, including those of the name of Fischer, in the special case mentioned, as also on the other legacies,—and judgment ordered to be entered for the King on the second count of the information against the defendant for the amount of the duty due upon the said legacies, leave being reserved to the parties to be heard on the said questions as to the amount of the duty, if necessary, before the judgment be so entered.'

gacy duty. The burden therefore falls by law on the pursuers; and in addition to this, they have become bound to grant full and ample discharges in this country, which they cannot do without paying for the stamp on which it must be written.

**LORD CRAIGIE.**—I am of the same opinion. It has been said, that the parties did not attend to the legacy duty; but I cannot hold so. It seems to have been provided for in the obligation to give a full and ample discharge.

**LORD GILLIES.**—This is a case of difficulty. It is settled that the duty is exigible by the Crown, so that we have nothing to do with that question. But the point is, What is the agreement of parties as to the payment of it? To me it appears that they had omitted altogether to make any provision for this, and that being a *casus omissus*, we may perhaps, *ex equitate*, lay the burden on each of them equally. I do not say that we have power to do so; but I think this point, which has not been argued, ought to be considered. At present I cannot concur in the interlocutor, and I would suggest that the Court should hear further as to this part of the case.

**LORD PRESIDENT.**—The suggestion of Lord Gillies is certainly equitable, but I doubt extremely whether we have power to adopt it. The question is, Whether the agreement is so doubtful as to warrant us in doing so? I think it is not. It is perfectly clear that if the pursuers had agreed to take £55,000 on the spot in satisfaction of their claims, and had said nothing as to the discharge, the defender would have been bound to pay that sum. But that is not the agreement. It is, that the money is to be paid in Edinburgh, and a full and ample discharge delivered on receiving payment. Now, suppose it were the law, that when a legacy was left in this country to a foreigner, he should be required to come here and grant the discharge, the expense of his journey would fall on himself; or suppose that it was enacted that the discharge should be in letters of gold, the foreigner would be obliged to give such a discharge, and the expense of it could not be imposed on the executor. But the law says that the discharge of a legacy must be written on paper of a certain stamped value; and therefore, when a foreigner comes here to receive payment of his legacy, he must be at the expense of giving such a discharge. Accordingly, such is the agreement in this case; for the pursuers have bound themselves to grant full and ample discharges, on receiving payment in this country.

**D. CLEGHORN, W. S.—MACKENZIE and INNES, W. S.—Agents.**

DUKE of ATHOLL, Pursuer.—*Jameson.*

No. 165.

CHARLES STEWART, Defender.—*Gordon.*

*Servitude.*—Held that a right of shealing or pasturing cattle, having been conveyed by dispositive words, did not imply a right of property.

IN 1727, the then Duke of Atholl granted a precept of clare constat and charter of novodamus in favour of Neil Stewart, as heir of his father Donald, who died infeft in the lands of Shearglass. By that deed it was declared, that ‘seeing the said Neil has restricted and thirled his said lands and others in manner after expressed to our mill of Blair, and that for our granting of this novodamus of the said old feu-lands, with the addition of the shealings and moss-leave underwritten: Therefore, and for other onerous causes moving us, wit ye us to have of new given, granted, disposed, and for ever confirmed to and in favour of the said Neil Stewart, &c. all and hail the said lands of Shearglass, &c. together with all and sundry houses, biggings, grassings, shealings, mosses, &c.; as also to have of new given, granted, and disposed, as we hereby give, grant, and dispo, and for ever confirm to the said Neil Stewart and his foressaids, heritably and irredeemably, as said is, all and hail the just and equal half of the shealing of Kyriees upon the water of Ealder, with full power to them and their foressaids, and to their tenants and possessors of the said six merk land, to sheal and pasture their bestial yearly thereon in manner used and wont,—reserving always to us and our heirs the deer that shall happen to be within the bounds of the said shealing: As also we dispo, and allow to the said Neil Stewart and his foressaids, and to his said tenants and possessors of the said lands, to cast as many peats yearly in our moss of Carrick as will be necessary for their families, and with power to them to win and lead the same, and with free ish and entry to said shealing of Kyriees and moss of Carrick in manner used and wont.’ By the precept of sasine the Bailies were ordered to ‘give and deliver heritable state and sasine, and also real, actual, and corporal possession of all and hail the said six merk land of Shearglass, comprehending the ward iales, half shealing of Kyriees, moss-leave of Carrick, and others above mentioned.’ These lands were thenceforth possessed by Neil Stewart and his descendants; but a dispute having arisen between Mr Stewart, the present possessor, and the Duke of Atholl, as to the right which the former enjoyed over the lands of Kyriees, his Grace brought an action of declarator to have it found that Stewart had merely a servitude of pasturage. In support of this he stated, that his ancestors had been in the practice of granting a right of

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D.

shealing (which, he stated, meant pasturing cattle) upon certain lands on which there were extensive forests, in favour of their vassals; and that accordingly the right of shealing and pasturing one half of the lands of Kyriees had been granted by the above deed, and that the possessors had never exercised any acts of property. To this it was answered, that the deed was intended to convey a right of property;—that dispositive words were employed;—that a precept of sasine for infefting was granted, and that Mr. Stewart and his predecessors had been in the practice of hunting and shooting on the lands; and also of occasionally cutting feal and divot, which was the only act of property that it was possible for them to exercise. The Lord Ordinary decerned and declared in terms of the libel, and the Court adhered.

The Court were clearly of opinion, that although the deed was expressed in dispositive terms, yet that the true intention of it was merely to constitute a servitude of pasturage; and that such being the case, and there being nothing to prevent a servitude being so constituted, the alleged acts of proprietorship were irrelevant.

H. GRAHAM, W. S.—A. STORIE, W. S.—Agents.

No. 166.

JAMES REID, Pursuer.—*Simpson*.—*J. W. Dickson*.

ROBERT HOPE and Others, Defenders.—*Skene*.

*Process—Expenses*.—A judgment of the Court of Session, assoilizing defenders, having been reversed by the House of Lords, and a remit made to repel the defences, and decern, but nothing said as to expenses, held incompetent to award them to the pursuer.

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Lord Eldon.

H.

REID brought an action against Hope and others, concluding for payment of £600; against which they stated various defences. Lord Alloway pronounced an interlocutor containing certain findings; against which the defenders having reclaimed, the Court adhered, but found that they were 'not liable in the expenses of process.' Against this judgment both parties presented petitions,—the pursuer praying that it might be altered 'in so far as it finds no expenses due to the petitioner, or at least to supersede consideration of this petition till the petition upon the merits shall be disposed of.' The Court refused this petition; but, on advising the petition for the defenders, they altered the interlocutor on the merits, and assoilized them; and against this interlocutor they refused a petition for the pursuer. He then entered an appeal to the House of Lords, by whom it was ordered and adjudged, 'That the interlocutors complained of in the said appeal,

'so far as therein complained of, be, and the same are hereby reversed: And it is further ordered, that the cause be remitted back to the Court of Session to repel the defences, and to decern.' This judgment was applied in terms of it, and a remit was made to Lord Eldin to proceed further in the cause. A motion was then made by the pursuer for the expenses of process; in support of which he contended, that as the interlocutors complained of were reversed, and, among others, the one by which expenses were refused, effect could not be given to the judgment, unless expenses were awarded. To this it was answered, 1. That the House of Lords had made a special and limited remit 'to repel the defences, and to decern;' and that, consequently, the Court could do nothing more than was contained in that remit, in which no mention was made of expenses; and, 2. That the pursuer had merely prayed that the question of expenses should be superseded, and not that they should be found due to him; so that a reversal of that judgment could not imply that expenses were to be awarded to him. The Lord Ordinary found no expenses due, and the Court adhered.

The Judges were unanimously of opinion, that as there was a special remit by the House of Lords, and no authority was given to award expenses to the pursuer, they had no power to do so, and therefore that the demand for them was incompetent.

*Former's Authorities.*—Fringle, March 6. 1799, (No. 1. App. Exp.); Geddes, Feb. 16. 1816, (F. C.); Wilson, June 18. 1818, (F. C.)

J. Young,—W. Renny, W. S.—Agents.

Lord Medwyn, in virtue of the provision in the A. S. 12th November 1825, relative to difficulties in point of form arising under the new system of regulations, reported the following case to the Court: 'A debtor is incarcerated for a civil debt,—he applies to the Magistrates for liberation on a sick bill; they refuse the application, in respect the certificate is not in terms of the A. S. 1671, which is specially required by the Bugh Court Regulations, Part II. c. 5. The petitioner maintains that it is, and presented a bill of suspension and liberation. I declined to receive it, holding it to be incompetent, as there was nothing to suspend, nor any stay of diligence craved, and stated that the usual form of advocacy in such cases must be observed. A bill of advocacy was presented, praying for letters of advocacy, or a remit with instructions to alter and liberate, and arguing that the certificate was sufficient to warrant such remit. I pointed out section 41st of the Judicature Act, and refused to receive a bill of advocacy with any argument, and said I had no power now to remit with instructions—that I could only pass—that the letters must be expedited and enrolled; and the Ordinary, I fear, could not dispose of it by a remit at the first hearing, but must proceed, in terms of § 29. of the A. S., by ordering reasons of advocacy and defences, then close the record, and pronounce judgment. The delay of this proceeding was objected to, if the man was truly entitled to liberation; but it

No. 167. MRS. GRIZEL WATSON AND HUSBAND, Pursuers.—*Forsyth—Jeffrey—More.*

MRS. NOBLE'S TRUSTEES, Defenders.—*Moncreiff—Cockburn—Whigham.*

*Deed of Settlement—Reduction.*—Deeds of settlement reduced, which were made by a person capable of disposing of her estate, but incapable of judging correctly of the effect of the deeds in question, and as not being her voluntary acts, though not obtained by undue influence of the parties in whose favour they were granted.

Nov. 18. 1825.

2D DIVISION.  
Lord Cringletic.  
B.

THE late Mrs. Noble left two deeds of settlement, bearing to be executed by notaries, in respect that she could not write on account of blindness. By the first deed, dated 6th May 1815, she conveyed to certain persons, in trust, her whole property, for the purposes, 1. Of paying her lawful debts; 2. Of conveying, after her death, to Mrs. Hamilton, one of two nieces, (the pursuer Mrs. G. Watson being the other,) her half of the lands of Badingsgill; 3. Of conveying certain other heritable property to Mr. Hamilton, whom failing, to Mrs. Hamilton; 4. Of selling the subjects, in the event of Mr. and Mrs. Hamilton dying before the execution of the conveyances, and dividing the price among their children; 5. Of selling the whole remainder of the estate, and paying out of the proceeds £100 to Mrs. Watson, and dividing the residue equally among her children and those of Mrs. Hamilton. This deed was delivered to the persons named as trustees; but it contained no clause reserving a power to alter, nor any precept nor procuratory. The second deed, dated 2d August 1815, was supplementary of this, and proceeded on the following narrative:—‘Considering that, on the 6th of May 1815, I executed a trust-disposition and settlement in favour of James Hamilton, merchant in Biggar, &c., for the purposes therein mentioned, and delivered the said deed to a majority of the said trustees, without reserving any power to revoke or alter the same, it being my intention at the time to render it absolute and irrevocable; and seeing that the said conveyance cannot be used for vesting the heritable subjects thereby conveyed to my said




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‘seemed at least that, so far as the Bill-Chamber is concerned, I can do nothing but pass.’

Several of the Judges were of opinion that the bill of suspension and liberation was perfectly competent; but it having been suggested that, in respect of the recent change in the forms, the party should be allowed to present a petition to the Court for liberation, an order was pronounced accordingly.

‘trustees, from the want of the necessary clauses, and that I am desirous to remedy that defect, and to express more fully the irrevocable nature of the said right, so as to leave no doubt of my intentions on that part.’ She accordingly disposed all the lands &c. as in the former deed, but irrevocably, (reserving however her own liferent,) and declaring this ‘to be a delivered evident, to the effect of depriving me of all power of altering the same.’

On Mrs. Noble’s death in 1820, Mrs. Watson raised an action of reduction of those deeds, on the grounds, that at the time ‘the foresaid two deeds of settlement were executed; the said deceased Margaret Noble was in such a weak and debilitated state both of body and mind, as to disqualify her from understanding the nature and import thereof, and rendered her incapable of conceiving the plan, and giving directions for framing such deeds of settlement; and the said deeds were not the free and voluntary expression of the will of Margaret Dickson alias Noble; but it was by means of the undue influence used by the said James Hamilton and his family, and their connexions, over the said Margaret Dickson alias Noble, that she was prevailed upon to appear to authorize the said deed to be executed for her, if she ever did give authority, or apparent authority, to the notaries by whom the deeds are subscribed, to execute the same for her.’ The cause having been remitted to the Jury Court, certain issues were there prepared and sent to trial. To the two first of these, which inquired whether, at the date of the deeds under reduction, Mrs. Noble was ‘of a sound and disposing mind, and capable of understanding her affairs?’ the Jury returned a verdict, finding that she was ‘in such a state of mind as to be capable of disposing of her estate and effects;’ and in answer to the other issues they found, ‘That the said Margaret Dickson, on the 6th May and 22d August 1815, was not blind, but laboured under a defect of sight, yet not such as to render her incapable of reading or seeing what she might write: That there is no evidence before the Jury, that Margaret Dickson gave instructions to prepare either the deed of 6th May or 22d August 1815: That, on 22d August 1815, the previous deed of 6th May was not read over, nor the tenor thereof explained, to the said Margaret Dickson; and that, on 6th May and 22d August 1815, the said Margaret Dickson declared that, from defect of sight, she was unable to sign the deeds aforesaid, and that she instructed notaries to sign on her behalf.’—In consequence of this verdict, the Lord Ordinary repelled the reasons of reduction, and assolizied; but

to the deeds under reduction. That presumption, however, being now overturned by the facts as found in the second verdict, which is no way inconsistent with the first, and it being established that Mrs. Noble was incapable of understanding the deeds in question, and that they were not her voluntary acts, both deeds must be reduced. There is certainly some distinction between the deeds, the second being liable to objections which do not affect the first; but the difference is not sufficient to warrant a different result in applying the verdict to them.

**LORD GLENLEE.**—The Jury has found, in reference to both deeds, that Mrs. Noble was not capable of correctly understanding them, and that they were not her free and voluntary acts. It matters not that there was no evidence of undue influence. There must have been evidence to satisfy the Jury that they were not her acts; and these two facts being established, form a sufficient warrant of reduction.

**LORD ALLOWAY.**—In so far as regards the second deed, I concur in the opinions already delivered. But the first deed stands in a very different situation. It is merely a simple expression of will as to the disposal of estate and effects. There is no intricacy in it, and nothing that a person found capable of disposing of his estate might not understand and execute. Neither does it contain any clause taking away the power of revocation; and though it was delivered, yet, being a *mortis causa* settlement, it might have been revoked even in *articulo mortis*; and this Court would have granted warrant for redelivery for that purpose, on the application of the grantor. The second verdict, therefore, can have no application to this deed, as it only finds that Mrs. Noble was incapable of understanding them so far as affecting her power of revocation, which was in no way touched by the first deed. As to that part of the verdict which finds that the deeds were not Mrs. Noble's free and voluntary acts, if it had proceeded, 'but were obtained by the undue influence of the defender,' then the case would be altered; but, as it stands at present, it does not afford a sufficient ground of reduction.

*Pursuers' Authority.*—Gillespie, Feb. 11. 1817, (F. C.)

*Defenders' Authority.*—Scott, Nov. 17. 1789; (4964.)

A. PATERSON, — A. GOLDIE, — W. S. — Agents.



**J. PHILPOTTS and Others, Pursuers.—Walker.**  
**J. P. GRANT and Others, Defenders.—Fullerton—H. Bruce.**

No. 168.

*Expenses.*—Circumstances in which, although no judgment was given on the merits, the pursuers were found liable in expenses.

PHILPOTTS and others brought an action for £15 : 2 : 4 against Grant and others, being expenses incurred by correspondence and otherwise, in consequence of diligence which they had raised on a bill accepted by the defenders. Lord Alloway remitted to the Auditor to 'tax the account pursued for, and state in his report how far the same appears to him to be fairly and reasonably charged, and according to the usual practice for business of a similar nature.' The defenders having represented, Lord Eldin recalled the interlocutor complained of, and remitted to the Auditor of Court to report as to the charges in the account pursued for that are objectionable by the established rules of this Court, and found the pursuers liable in expenses. Against this judgment the pursuers reclaimed, stating that they were perfectly willing that a remit should be made to the Auditor, but that it was not consistent with justice that they should be found liable in expenses, seeing that his report might be in their favour. The Court, however, without assigning any particular reasons, adhered.

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Lord Eldin.

D.

WALKER, RICHARDSON, and MELVILLE, W. S.—W. COOK, W. S.—  
 Agents.

**J. PEARSON and Others, Pursuers.—Forsyth—Moncreiff.**  
**W. GRIERSON, Defender.—Skene—Whigham.**

No. 169.

*Executor.*—Circumstances in which it was held that an executor was not responsible for money deposited in an English bank which had become insolvent.

THE late William Boyle, a native of Scotland, settled as a merchant at Port of Spain in the island of Trinidad, where he carried on business in partnership with Martin Strickland, under the firm of Boyle, Strickland, and Company. He subsequently returned to Liverpool, where he established a branch of the firm, while Strickland remained at Trinidad. The company, from an early period till the death of Boyle, employed Thomas Worswick, Sons, and Company as their bankers in Lancaster, and had at the end of each year considerable balances in their hands. On the death of Boyle, it was found that he had executed a testament at Trinidad, by which, after bequeathing certain legacies,

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1st Division.

Lord Meadowbank.

H.

he appointed Pearson and others to be his residuary legatees, and nominated Strickland and the defender Grierson, who resided in Dumfries, to be his executors. These persons accepted the office, and the will was proved in the proper Court by Grierson. Soon thereafter Strickland came to England, and it was ascertained that the balance due to Boyle, and which was in the hands of Worswick, Sons, and Company, was £7454:15:10. Some difficulty having arisen as to the nature of the right of the legatees, the will could not be immediately carried into execution; and in the meanwhile Strickland died. Grierson thereupon obtained an order from the executor of Strickland on Worswick, Sons, and Company, by which the above balance was entered in his name as the executor of Boyle. This company, contrary to the general practice of bankers in England, allowed five per cent. upon money deposited with them. By the unexpected failure of a banking establishment in London, Worswick, Sons, and Company, who had hitherto been in perfect good credit, became insolvent while the above money was in their possession:

For the loss which was thus sustained, Pearson and others, the residuary legatees, brought an action against Grierson; in support of which they contended, 1. That he was bound to have put the money in a place of greater security than that of an English banking establishment, the partners of which are limited in number; and that as both he himself and all the legatees were resident in Scotland, he ought to have secured the money in this country; 2. That the circumstance of Worswick, Sons, and Company giving so large a rate of interest as five per cent. ought to have created suspicions that the money was not secure; and that as it was his duty, as an executor, to attend to its preservation more than to profit, he ought to have taken the money out of their hands; and, 3. That, in point of fact, he had made use of the money, and operated on the account for his own private use. To this it was answered, 1. That he had not put the money into the hands of these bankers, but that this had been originally done by the testator, and that he had only allowed the money to remain there; 2. That as these bankers were unquestionably in good credit till their failure, the allowance of five per cent. could not give rise to any suspicion; and that if he had removed the money to a bank where smaller interest was given, he might have rendered himself liable for the difference; and, 3. That it was not true that he had employed the money for his own purposes.

The Lord Ordinary found, ' That the defender having, without necessity, and with a want of caution equivalent to undue

‘and culpable negligence, vested the funds belonging to the estate of the deceased William Boyle on the personal security of an English trading company, has thereby rendered himself liable to make good the loss which would otherwise be sustained through the subsequent failure of the said trading company;’ and therefore decerned in terms of the libel. But the Court, after ascertaining by the report of an accountant, that Grierson had not applied the money to his own use, altered, and found that he was ‘not liable for the funds belonging to the estate of the deceased William Boyle, vested in the banking-house of Worswick, Sons, and Company;’ found him entitled to his expenses out of these funds; and afterwards explained, that although he was responsible, as executor, for the dividends, yet he was not personally liable for any loss that might ultimately be sustained.

**LORD CRAIGIE.**—The only question is, Whether this executor is liable for the loss, in consequence of allowing the money to remain in the bank? It is to be observed, that it was not put there by him; but that this was originally done by the testator. With regard to the payment of high interest, it may no doubt in some cases excite suspicion; but here it is admitted that the bankers were in good credit till their failure. This misfortune was occasioned by an unexpected event, and it would therefore be a grievous hardship to make this executor liable for the loss thence arising.

**LORD BALGRAY.**—An executor is a trustee; and if he had made choice of this bank, and put the money there, the question would have been different. But he did not do so. He only allowed it to remain where it had been placed by the testator. If he had traded with it, or if he had allowed it to lie there in order to make profit to himself, he might have been liable. But this is not the fact.

**LORD GILLIES.**—It certainly appears a very extraordinary complaint against the executor, that the money was allowed to lie in a bank which gave five per cent. of interest. He acted in perfect good faith; and unless it could be proved, (which is not alleged,) that he allowed the money to remain there for a sinister object, and in bad faith, it is impossible to render him liable.

**LORD PRESIDENT.**—At the first advising, I was rather disposed to support the interlocutor; but I am now satisfied that the executor is not liable, and that he has been placed in an embarrassing situation. The executor found the money in the bank producing interest at five per cent.; and if he had taken it out and placed it in a chartered bank, which either gave no interest at all, or at a smaller rate, he might have been exposed to a claim for the loss thence arising.

*Pursuers' Authorities.*—Toller on Exchequer, 465. 433. 430; 5. Ves. 529; 2. Ves. 61; 1. Ves. 89; 6. Cowp.; 3. Ersk. 9. 41; C. of Caithness, June 3. 1747, (534.)

*Defender's Authorities.*—Toller, 481. 482; 2. Ves. 85; 7. Ves. jun. 197; 1. Ersk. 7. 24; Steven, July 9. 1667, (500); Gibb, Feb. 5. 1769, (16363.)

MACKENZIE and SHARP, W. S.—R. WALSH,—Agents.

No. 170.

G. TAIT, Pursuer.—*Cunninghame.*

J. PATON, Defender.—*Jeffrey—Currie.*

*Reparation.*—Circumstances in which it was held that a landlord was not liable in damages to a tenant for ejecting him and his family at a time when it was alleged he had also the tenant's effects attached by sequestration.

Nov. 19. 1825.

1st Division.  
Lord Meadowbank.  
H.

IN 1820 Tait entered into a tack with Paton, by which the latter set to him for nineteen years certain houses, grass, and fallow from Whitsunday, and arable lands from Martinmas 1824. He entered to possession, but failed to perform certain obligations, and to pay his rent. In security of the arrears, a sequestration was executed of his whole effects; and in October 1822 Tait renounced the lease, and bound himself to remove 'furth and from the said lands, and that at and against the term 'of Whitsunday next 1823 as to the houses, grass, and fallow 'land, and at the separation of that year's crop from the ground 'as to the arable land; and to leave the same void and redd, except as to the barn and barn-yard for the use of the waygoing 'crop;' reserving, however, in favour of Paton the sequestration over the effects. A decree of removal under the A. S. 1756 was also obtained against Tait. On the arrival of the term of Whitsunday, Tait accordingly removed from the dwelling-houses, but kept possession of the barn and barn-yard. In the barn-yard, and communicating with the barn, he, however, erected a kind of dwelling-house having a fire-place and chimney, brought his furniture into it, and took up his abode there with his family. After remaining for a short time, Paton intimated that he had withdrawn the sequestration, and presented a petition to the Sheriff of Roxburghshire, praying him to find that Tait 'had no 'right to occupy or use the said barn-yard for any other purpose 'than for the use of the waygoing crop, as specified in the said 'contract, and prohibit and discharge him accordingly from using 'or occupying the same in any other way; and grant warrant, &c. 'summarily to eject the said George Tait, his family, servants, 'goods and gear, furth and from the said barn and house erected 'by him in the barn-yard aforesaid, and furth and from all and 'every part of the said lands.'

The Sheriff, without issuing any order for service, and on considering the productions, found, 'That the before-designed George Tait is not entitled to use the stack-yard and barn mentioned in the petition for any other purpose than for stacking up and thrashing out his waygoing crop;' but, before granting warrant of ejection, he appointed the petition to be intimated, with certification that if Tait did not remove within three days thereafter, the warrant would be granted. Tait having failed to do so, the Sheriff, 'in respect George Tait has refused to take the benefit of the time allowed him to remove as above mentioned, and still sits violently in the premises within mentioned,' granted warrant 'to eject the said George Tait, his family, servants, goods and gear, furth and from the whole premises so violently occupied by him, as mentioned in the petition, and furth and from every part of the farm of Crailingnook, excepting from the stack-yard and barn for the purposes of stacking up and thrashing out his crop, as mentioned in the petition, in terms of the prayer of the petition.'

In virtue of this warrant, Paton ejected Tait and his family, together with all his household furniture and agricultural implements, from the lands, and from the barn and barn-yard. Tait thereupon brought an action of damages, alleging, 1. That as the sequestration had not been removed until after the period for taking houses had expired, he had, by the act of Paton, been unable to provide shelter for his family; and that although the sequestration had been withdrawn as to the furniture, yet it was continued over the farm utensils; and that, notwithstanding this and the terms of the contract, Paton had thrown them out of the barn on to the public road, whereby he had sustained great loss; and, 2. That the warrant of ejection was irregular, had passed in absence, and gave no authority for ejecting the agricultural implements, which were essential for the use of the waygoing crop. In defence Paton pleaded, 1. That the action was incompetent, because the warrant of ejection was a subsisting and effectual authority for doing all that had been done; and, 2. That it was irrelevant, because Tait had taken violent possession of the barn and barn-yard for purposes to which he had no right to apply them;—that the sequestration had been removed before the ejection was executed;—and that even if it had not been so, the possession of one right could not prevent the exercise of another; and that there was no waygoing crop, for the use of which the farm utensils were required.

The Lord Ordinary found the action incompetent and irrelevant, and dismissed it, 'in respect the decree of removing pro-

‘nounced by the Sheriff is not sought to be reduced, and that it is sufficiently established that there was nothing irregular done in carrying that decree into execution.’ The Court, by a majority, adhered, on advising two petitions with answers.

**LORD HERMAND** was of opinion that the conduct of Tait was such as would have warranted an action of damages by Paton against him, and that the present claim was quite unfounded.

**LORD CRAIGIE** considered that Tait had been very harshly used. The landlord had certainly exercised the *summum jus*, and done so in such a manner as rendered him responsible for the consequences. With the one hand he held the effects by means of a warrant of sequestration; and, with the other, he, by a warrant of ejection, had thrown them out of the premises. This latter warrant did not authorize him to do all he had done; and if Tait could show that there was a single article ejected which was not embraced in it, he would be entitled to reparation. No doubt, it is said that the landlord passed from the sequestration; but he was not entitled to do so, merely for the purpose of enabling him to eject the effects per aversionem, and particularly in the mode in which Tait alleges this was done. The Court should in such a case give redress; but it seemed inexpedient to remit it to the Jury Court.

**LORD BALGRAY**.—The principles which have been now laid down are somewhat extraordinary. The tenant agreed to remove at Whitsunday 1823, and it was his business by that time to have provided lodgings for himself. His effects were, in consequence of arrears of rent, liable to sequestration; and the landlord was entitled to avail himself of that right. Instead of removing, Tait took up his abode in the barn, which he had no right to do, the contract having reserved it merely for the use of his waygoing crop. A warrant of ejection was subsequently obtained, which the landlord was entitled to enforce; but, before doing so, he intimated that the sequestration was withdrawn. It is said, no doubt, that the ploughs, harrows, and other farming utensils were thrown out and exposed to the open air, and damages are claimed on this account; but they are usually placed no where else. Such a claim is absurd. His right to the use of the barn and barn-yard for stacking and thrashing his waygoing crop was reserved; so that all his rights are preserved entire. There is, therefore, no relevancy in the summons.

**LORD GILLIES**.—As the case is one of a trifling nature, it is desirable to avoid farther expense. But Tait has certainly stated a relevant case. Perhaps no loss was sustained from the ploughs, &c. being exposed to the open air; but he alleges that other articles were wantonly thrown on the public road, without regard to their safety or protection. The main difficulty here arises from

the sequestration. It is said that the tenant should have provided lodgings, and removed at Whitsunday. But how could he do so, when all his effects were attached by the sequestration? He might, no doubt, have removed himself and his family; but he would have done so to bare walls. The agreement was, that he should remove at Whitsunday 1823; and his failure to do so arose entirely from the act of the landlord. It is true that the sequestration was subsequently withdrawn; but this was not until after the term when houses are taken; so that Tait had no other alternative but to shelter himself and his family in the barn.

**Lord President.**—This is no doubt a distressing case; but it is one in which there is no ground, in point of law, for subjecting the landlord in damages. The contract brought the lease to an issue, just as if there had been a natural termination of it. At this time the tenant was in arrear of rent, and the landlord was entitled to sequester for payment of it. This often occurs at the end of a lease; but, notwithstanding, the tenant must remove. It may be, that he must go to bare walls; but this is a misfortune arising from his own act, and cannot entitle him to withhold possession from the landlord. No doubt, if the landlord sequester the effects, and then remove the tenant, he must provide a place for the preservation of these effects; but this does not entitle the tenant to retain possession of the farm. In this case Tait converted the barn into a dwelling-house, and the landlord had a right to prevent him from doing so, and to eject him and his family. There being, therefore, merely an allegation that the diligence of the law has been executed, and there being no appearance of any irregularity, the claim of damages is not well founded.

J. DICKIE, W. S.—J. KERMAK, W. S.—Agents.

W. FERGUSSON, Suspender.—*Forsyth.*

No. 171.

MAGISTRATES OF STIRLING, Respondents.—*Sol.-Gen. Hope.*

*Prisoner—Debtor and Creditor.*—An imprisoned debtor not entitled to liberation on the death of his incorporating creditor.

FERGUSSON was incarcerated in the jail of Stirling for payment of a debt by Stewart, who died shortly after an aliment had been awarded to Fergusson under the Act of Grace. The aliment was continued by an agent in Stirling, but no person having made up titles to Stewart's succession, Fergusson, after the lapse of a month, presented a bill of suspension and liberation, on the plea that there was no person who had a right to detain him in prison. The bill was not served on the agent, but only on Stewart's widow, and on the Magistrates of Stirling. The wi-

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Bill-Chamber.  
Lord Mackenzie.  
F.

dow made no appearance; but answers were lodged for the Magistrates, merely expressing their willingness to obey the order of the Court. The Lord Ordinary refused the bill, with expenses; whereupon Fergusson (who in the mean time had been liberated on executing a disposition omnium bonorum) presented a reclaiming note, which the Court refused, with additional expenses.

P. Crooks, W. S. Agent.

No. 172. W. KIPPEN and Others, Suspenders.—*Jeffrey—Mancreiff—  
Ivory.*

G. CAIRNS, Charger.—*Sol.-Gen. Hope—Skene.*

*Res inter alios acta—Process.*—A pursuer in an alternative summons against two defenders held bound by a verdict in a trial between the defenders, he having acquiesced in that mode of determining the cause.

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2d Division.

Bill-Chamber.

Admiralty.

M'K.

CAIRNS shipped on board the brigantine Lonsdale, belonging to Ranken and others, then lying at Limerick, and bound for Greenock, a quantity of oats, as to which he effected an insurance with Kippen and others, underwriters in Glasgow. The vessel, having proceeded on her voyage, struck on a rock in the Shannon, and immediately brought up in Tarbert roadstead, where she lay a few days, but sailed again without any repairs. Shortly afterwards she went to the bottom, whereby her cargo was totally lost. Cairns then raised an action in the Court of Admiralty against both the underwriters and the master and owners of the vessel, concluding alternatively that the one party or the other should be found liable to him in the amount of the loss, according as it should turn out that the shipwreck had been the result of the master's negligence, or of the perils of the sea. After some preliminary procedure, the Judge Admiral appointed the underwriters and the owners to give in mutual condescendences of the facts they offered to prove, stating in a note, 'This question now virtually resolves into a question between the owners and the underwriters, and should be conducted on that principle.' Condescendences having been lodged, Cairns put in answers, stating, that in the event of the case being sent to a Jury, it would only be incumbent on him 'to see that the issues shall be framed in such terms as may of necessity bring out a verdict by which it shall be established that either the underwriters or the owners are answerable for the consequences of the loss of the Lonsdale, in order that he, the pursuer, may be clearly entitled to come upon the unsuccessful party in the Jury Court for decree in terms of the libel.'



The cause having been remitted to the Jury Court, Cairns attended at adjusting the issues; but it was agreed that he should take no part in the trial, at which the underwriters were held as pursuers, and the owners defenders. A special verdict having been returned favourable to the underwriters, and against the owners, the case returned to the Admiralty Court; when Cairns, on the supposition that the statutes 7. Geo. II. c. 15. and 26. Geo. III. c. 86. relieved the owners from all responsibility when the vessel was lost, contended that he was entitled to have a new trial as between him and the underwriters, and to disregard the verdict already obtained, being, *quoad* him, *res inter alios acta*.

The Judge Admiral found that the pursuer was not bound by this verdict, but was still entitled to prove his libel against the underwriters, and appointed him to give in a condescence of what he offered to prove in support of it. A condescence was accordingly lodged; but the underwriters declined answering it, and allowed judgment to go against them by default. They thereupon presented a bill of suspension, and raised a summons of reduction; on advising which, the Court 'conjoined the processes, and remitted to the Judge Admiral with instructions 'to recal his interlocutor and subsequent procedure in the cause; 'to find that the verdict already pronounced in this case is binding on the chargers, as well as on the other parties; and, *quoad* ultra, to hear parties, and to do as he shall see cause.'

The Court (with the exception of LORD ALLOWAY) were of opinion, that as the manner in which the case had been tried was the necessary result of the pursuer's own conduct in raising an alternative summons, instead of bringing separate actions, and as he had acquiesced in the mode of trial adopted, he must be held to have entered into a judicial transaction to be bound by the verdict; and therefore that he was not entitled to a new trial, except on grounds which might have been competent to the immediate parties to it, or for the purpose of determining additional facts which were not fixed by the former verdict, and might be necessary to the final decision of the case,—such as the amount of loss at the time of first putting in to Tarbert roads.

GIBSON-CRAIGS and WARDLAW, W. S.—T. JOHNSTONE,—Agents.

No. 173. W. STOREY and MANDATORY, Pursuers.—*Jeffrey—Marshall*.  
M. KING, Defender.—*Moncreiff—Monteith*.

*Process—Consignation.*—Circumstances in which consignation by the defender of the sum pursued for, ordered in limine.

Nov. 19. 1825.

2d DIVISION.  
Lord Mackenzie.  
B.

A vessel belonging to Storey having been arrested in 1813 at Guadaloupe, at the instance of Messrs. Cavan of Barbadoes, who claimed a right of property in her, she was allowed to go to sea, on her value being left in the hands of King, (then residing at Guadaloupe, and who had purchased part of her cargo to that amount,) there to remain till they should take legal steps to settle the question of property in a Court of Admiralty. Storey gave King a power of attorney as to this matter, but no legal steps were ever taken; and in 1817, when King was leaving the West Indies, he, without any authority from Storey, allowed Messrs. Cavan, with whom he had some mercantile transactions, to take credit for the sum left in his hands. Having returned to this country, he was shortly thereafter called in an ordinary action by Storey for payment of this sum.

The Lord Ordinary, after taking some steps to determine certain disputed facts on which King founded his defence, ordained the sum pursued for, with interest, to be consigned, on a receipt payable to the party or parties who should ultimately be found entitled thereto. Against this order King reclaimed; but the Court unanimously adhered, restricting the interest to be consigned to that due from the date of citation.

The ground of the restriction as to interest was, that no interest was due ex lege on such debts as that here pursued for by the law of England.

J. PATTISON, W. S.—GIBSON-CRAIGS and WARDLAW, W. S.—Agents.

No. 174. A. MILLER, Advocate.—*D. of F. Cranstoun—Macfarlane*.  
W. BLAIR, Respondent.—*Moncreiff—S. Stewart*.

*Fishing.*—Held that a party having a right of salmon-fishing is entitled to access to the banks on both sides of the river, in order to exercise his right; but that this is to be done in a way the least oppressive to the adjoining heritors.

Nov. 22. 1825.

1st DIVISION.  
Lord Alloway.  
D.

BLAIR and his ancestors were proprietors of the salmon-fishing along a certain portion of the course of the river Garnock, in virtue of a Crown charter. In particular, by a charter in 1782, there was conveyed to him 'Totam et integram piscationem, tam salmonum, quam aliorum piscium quorumcunque, in aqua de Garnock, ex utroq. latere ejusd. ab ore et exitu torrentis vocat.

‘lie Roughtburn in dict. aqua in eadem borealiter ascenden. usq.  
 ‘ad rivolum de Pôlgrie, alias vocat. Crawfield, cum lie cruives  
 ‘ejusd.; et cum potestate et libertate condendi plures lie cruives  
 ‘in quacunq[ue] parte dict. aquæ intra limites antedict., cum om-  
 ‘nibus et singulis commoditatibus et privilegiis eidem pertinen.’

At a part of the river called the Rackpool, and over which Blair's right extended, it was bounded on the one side by the lands of Kersehead belonging to Miller, and on the other by those of the Earl of Glasgow. For many years Blair had access to the pool, by driving his cart and horse with nets and cobbles, by a road or inlair along the side of a stream called the Rye or Ryeburn, running at right angles, and communicating with the Garnock; and when this was shut up by the road trustees, he occasionally passed under a dry arch of a bridge at the foot of the pool, going along the gravel banks of the river on the Earl of Glasgow's side, and occasionally along the banks of Miller's lands. Miller, however, having recently built a stone-wall on his side of the river, so as to prevent Blair from having access to the pool, the latter presented a petition to the Sheriff of Ayrshire, praying for an interdict against Miller obstructing him in the exercise of his right. In support of this he stated, 1. That, at common law, a right of salmon-fishing implied a right of access to both sides of the river; 2. That such a right was expressly conveyed to him by his titles; and, 3. That he had been immemorially in possession of such a right, by carrying his nets and boat with a cart and horse, when necessary, along Miller's grounds, until he had been lately impeded by means of the wall. To this it was answered, 1. That neither by common law, nor by Blair's titles, had he any right to drive a horse and cart, accompanied by a body of fishermen, through the lands of the adjacent heritors; 2. That he had no possession to that effect; and, 3. That he had formerly access to the river on the opposite bank by an inlair or road along the side of the Rye communicating with the Garnock, but which road he, as one of a body of trustees, had shut up; and that he had still a sufficient road, by driving his horse and cart along a part of the channel on Lord Glasgow's side, which was always dry, except when there were large floods, and when fishing was impracticable. The Sheriff-substitute allowed a proof of possession; and, on advising it, found, ‘That the pursuer has proven his right of fishing at the Rackpool, on both sides of the water of Garnock, for upwards of 40 years; and that, in going to and returning therefrom, he went by the defender's holm of Kersehead. That the defender has proven that the pursuer and his predecessors, in fishing at the Rackpool, went by the in-

‘lair, and there took out their nets and curraugh (small boat,) ‘fished the pool, and returned in the same direction: That the ‘defender has also proven that the pursuer, or those employed ‘by him, sometimes went up the bed of the Garnock to the foot ‘of the Rye, and fished the pool in the same manner as when ‘they went by the inlair: That these acts will not deprive the ‘pursuer of his right of going on the east of the Garnock along ‘the side of the defender’s holm, and which right he has exercised for upwards of 40 years, flowing from charters from the ‘Crown, and therefore that he has a right to continue to go ‘in that direction; but recommends to the pursuer to exercise ‘this right with as little injury to the defender as possible, and ‘take the road at the side of the water of Garnock to the Rackpool; and when he has a horse and cart, to go as often by the ‘inlair as possible.’ To this interlocutor the Sheriff-depute adhered, ‘with this variation, that instead of its being merely recommended to the pursuer to take the road through the defender’s holm as near as possible to the brink of the river, he is ‘hereby found entitled to a road only in that direction, as being ‘least injurious to the servient tenement.’

Miller having brought an advocacy, the Lord Ordinary, ‘In respect it is the duty of the proprietor of every dominant ‘tenement to exercise his right of servitude over the servient tenement with the least possible injury to it, consistent with the ‘preservation of his own rights,’ remitted, before answer, to a surveyor to report as to the access which Blair had to the river on the side opposite to the lands of Miller. Thereafter, on advising that report, the Lord Ordinary found that there was sufficient room for a cart to pass on that side of the river, and that accordingly the carts which carried road metal from the banks of the river went in that direction;—that the evidence as to the possession on Miller’s side was contradictory; and, therefore, that as ‘there is no clear and distinct evidence of any servitude ‘of a horse and cart road in that direction claimed by the pursuer, he may exercise every right of fishing which he has in the ‘Rackpool, without injuring the defender’s holm, and without a ‘road through it; advocated the cause, and assolized Miller.’

Blair having reclaimed, the Court found, ‘That the petitioner’s (Blair’s) right of salmon-fishing in the river Garnock implies the accessory and necessary privileges of using the adjoining banks for the purpose of drawing his nets, and obtaining ‘access to the fishing stations, but that the petitioner must use ‘this right or privilege in a manner as little detrimental to the ‘proprietors of the banks, as is consistent with a full beneficial

'use of his right of fishing: That hitherto the petitioner has been generally accustomed to obtain access for his cart, carrying his nets and cobble to the Rackpool, by means of the inland road down the bank of the Ryeburn, or up from the bridge over the Garnock along the gravelly bank of that river: That, for the full beneficial use of his right of fishing, it is not proved that he has any immediate occasion for any road along the respondent's bank of the river from the bridge to the bottom of the Rackpool; but reserving to the petitioner to claim such road or access, if circumstances should hereafter render it necessary for the full beneficial use of his right of fishing: That when the petitioner's cart has brought his nets and cobble to the bottom of the Rackpool by either of the two roads above mentioned, or by any other to which he may be found entitled, the respondent must give free access to his fishermen on foot to carry their nets and cobble along his bank of the river to the head of the Rackpool, for the purpose of fishing that pool, and for that purpose must either make a proper opening in the wall which he has built across his holm at the bottom of that pool, or must put a swing-gate thereon, or, if a locked gate, must furnish the petitioner or his fishermen with a key thereof; and, with these explanations and findings,' they adhered to the interlocutors reclaimed against.

**LORD HERMAND.**—A grant of fishing implies a right of drawing nets on both sides of the river, and it is therefore incumbent on Miller to show that this right has been cut off by the negative prescription. But here there is evidence to the contrary, and therefore the interlocutor ought to be altered.

**LORD BALGRAY.**—Rights of this nature must be exercised with due discretion. They can only be made use of, so far as they are necessary to carry into effect the principal right to which they are accessory. Now, as a matter of right, Blair is entitled to have access to the top of the pool, so as to fish thence to the foot of it, and to carry his net and cobble for that purpose; but this must be qualified by its not being done in an oppressive manner.

**LORD PRESIDENT.**—The interlocutor is substantially right. Blair had formerly access to the pool by a road which he chose to give up; and he is not entitled, after having done so, to make the servitude on Miller's property worse than it formerly was. The proof does certainly not warrant a prescriptive right in favour of Blair; and so far the Lord Ordinary is right. But I cannot say that he is not entitled to fish on Miller's lands; because, from an alteration in the channel of the river, this may be rendered necessary. Fishing, no doubt, implies a right of access to the banks; but this must be

made use of in the least oppressive manner. Here there is a gravel bank on the one side, along which carts travel; and I think that the right should in the meanwhile be restricted to it, reserving access to Miller's lands, in the event of this becoming necessary.

**LORD CRAIGIE.**—This is an important question to the country. A grant of salmon-fishing gives as effectual a right to the grantee to make use of the adjoining banks for fishing, as a disposition of property gives to a donee. It is an error to call it a mere servitude; for it is properly an accessory to that which is in itself property. At the same time, it must be used with discretion; and it would therefore be proper to remit to an experienced salmon-fisher to report what is reasonable access, so as most effectually to enjoy the right.

**LORD GILLIES.**—It is true that Blair must have access to the river; but is he entitled to shut up a road on the one side, in consequence of a bargain with the heritor, and then to go through the fields of the opposite heritor? If he has once a reasonable access on the one side, he is not entitled to go to the other side, where he has formerly enjoyed no such access. Suppose that Blair were proprietor on the one side, and that he had perfect good access; would he be entitled to shut up his own road, and take possession of the bank on the opposite side belonging to another party? I think not. It should not, however, be said that he is never to have such access; because it may, by a change of circumstances, be rendered necessary.

**LORD BALGRAY.**—I doubt the doctrine which has been last laid down. Suppose I have a road through my property, and a servitude of road through the property of another, and I find it more convenient, after having used my own road for some time, to give it up, and avail myself of the others; is there any thing to prevent me from doing so?

**LORD PRESIDENT.**—I apprehend that the same principle applies here, as in the case of catholic securities. You are not entitled to throw aside the one, and put the whole burden on the other. Suppose that I have the property on the sloping side of the river, can I make an embankment there, and go to the other side? I conceive that would not be reasonable.

The Court, after taking time to consider, pronounced the above interlocutor, from which none of the Judges dissented.

*Respondent's Authorities.*—2 Ersk. 9. 4; 2 Ersk. 6. 15; Monymusk, Dec. 18. 1623, (10788.)

DONALDSON and RAMSAY, W. S.—W. PATRICK, W. S.—Agents.

**FERGUSON, HALLIBY, and COMPANY, Advocators.—G. Bell.**  
**W. GRAHAM, Respondent.—Whigham.**

No. 175

*Process—Mandatory.*—A pursuer not obliged to go on with an action when the defender is abroad, and has left no mandate.

A reclaiming note having been presented in the name of Graham against an interlocutor relative to expenses on a bill of advocacy of an Inferior Court process, in which he had been called as defender while residing in this country, it was objected on the part of Halliby and Company, the pursuers and advocates, that Graham had gone to America without leaving a mandate. To this it was answered, that he had not left this country *animo remanendi*; and besides, that it was not necessary that a defender should have a mandatory. The Court sisted procedure till a mandate should be produced.

Nov. 22. 1825.

2d Division.

Bill-Chamber.

Lord Robertson.

M'K.

Their Lordships held, that although the want of a mandatory for an absent defender did not invalidate proceedings which had actually taken place in a cause, the pursuer was not obliged to go on without one, if he saw cause to demand it.

**W. LITTLE,—T. JOHNSTONE,—Agents.**

**G. MILL and Others, Suspenders.—R. Bell.**  
**W. PAUL, Charger.—Miller.**

No. 176.

*Compensation.*—Held that a debt against a bankrupt, subsisting prior to his bankruptcy, and the execution of a trust-deed for behoof of his creditors, cannot be pleaded in compensation of a claim by the trustee, arising subsequently to the bankruptcy and the trust-deed.

PAUL, as trustee under a private deed of trust for behoof of Lawrie's creditors, having obtained decree for expenses against Mill in an advocacy of a process for ejecting him from a farm belonging to Lawrie, of which he had unwarrantably taken possession after the expiry of his right of tack, charged him and his cautioners for payment. They presented a bill of suspension, on the ground that this demand was compensated by a sum of expenses found due to Mill in another process with the trustee, and by an alleged claim against Lawrie and his estate, which had arisen prior to Lawrie's insolvency and the execution of the trust. The Lord Ordinary having of consent passed the bill in so far as regarded the counter claim of expenses, but refused it *quoad ultra*, Mill &c. presented a reclaiming note, and also raised a summons for payment of the alleged debt, which was served on the trustee the night before the case came on to be heard. The Court unanimously refused the note.

Nov. 22. 1825.

2d Division.

Bill-Chamber.

Lord Medwyn.

M'K.

**LORD GLENLEE.**—The interlocutor of the Lord Ordinary is right.

Where counter claims exist at the date of a sequestration, or an accession to a trust-deed, (for the same rules must regulate both cases), they may compensate each other, and that whether the claim on which compensation is pleaded be presently exigible, contingent, or future, provided it actually existed at that period; but where creditors accede to a trust, and thereby agree to take a dividend on their debts, if one of them unwarrantably attempts to take possession of part of the estate, and the creditors are found entitled to the expense of recovering possession, he can never plead compensation against that on his claim against the bankrupt estate, on which only he is entitled to a dividend. Were the claim of the suspender here the best in the world, he cannot set it off against the expenses charged for.

The other Judges concurred.

**T. SMALL, W. S.—INGLIS and WEIR, W. S.—Agents.**

**No. 177.**

**JEAN SUTHERLAND and HUSBAND.**—*Ritchie.*

**Colonel SUTHERLAND'S EXECUTORS.**—*Ivory.*

*Clause—Legacy.*—A testator having appointed £200 to be laid out at interest for J. S., and £100 to be paid to her at marriage—Held that both the interest and the £100 were due.

**Nov. 22, 1825.**

**2d Division.**

**Lord Cringletie.**

**M'K.**

The late Colonel Sutherland, in his latter will, declared it to be his 'desire, that, after all my just debts are paid, there shall be £200 laid out at interest, to be yearly paid to my reputed daughter Jean, who has been my housekeeper for several years; and that, in case of her marrying with the consent of my said executors and other friends, £100 shall be paid and secured for her portion.' In a process of multiplepoinding and exoneration raised by the executors, a question arose, whether, under this clause, Jean Sutherland (with whose marriage the executors declared themselves satisfied) was entitled to £100 as a marriage portion, over and above the interest of £200; or whether the £100 bequeathed as her portion was to be held as part of the £200? The Lord Ordinary held this latter construction to be the correct one, and that, on payment of the portion, the liferent was to be restricted to £100, and he preferred her to that extent only; but the Court altered, and preferred her to the liferent of £200, along with the £100 to be paid her.

**A. ROBERTSON, W. S.—INGLIS and WEIR, W. S.—Agents.**



B. FLEMING, Suspender.—*Moncreiff—Jameson.*

No. 178.

J. THOMSON, for the ROYAL BANK, Charger.—*Morc.*

*Cautioner—Diligence.*—Circumstances in which it was held,—1.—That although it was agreed that a security bill should be renewed for a certain period, yet, as the cautioner had become insolvent prior to the lapse of that period, the holder was not bound to renew it, but was entitled to proceed with diligence;—and,—2.—That heritable property belonging to the principal obligant, having been conveyed as a corroborative security, and without prejudice to the personal obligation of the cautioner, and the heritable security having been carried off in consequence of the titles not having been regularly completed, the cautioner was notwithstanding liable.

In 1817, a transaction was entered into between the Royal Bank on the one hand, and William Harley, merchant in Glasgow, and several other persons, on the other, by which the Bank agreed to advance in loan to Harley £7990, in consideration of a conveyance by him of his heritable property in security, and bills at 12 months date by the other persons as guarantees, each for a limited amount, to the extent in all of £6500, while Harley granted his own acceptance for the balance, being £1490. The conveyance to the property was ex facie absolute to Thomson for the Bank; but it was qualified by a back bond, in which the terms were specified. In particular it was stated, 'That it was a condition on which the foresaid sum of money was agreed to be advanced by the said Bank, that bills to the extent of £6500 of the foresaid sum should at the same time be deposited with the Bank, to be held as corroborative securities of the sum advanced as aforesaid, the one without prejudice of the other, with full power to operate upon the personal obligation created by the said bills, by horning, caption, adjudication, or otherwise, without hurt or prejudice to the heritable security created by the said disposition.' After specifying the different bills which had been granted, the deed proceeds: 'Which bill I oblige myself and my foresaids to renew in favour of the drawers and acceptors thereof, and of such other persons as may, with my approbation, be substituted in their place, until the term of Whitsunday 1822, under the usual discount.' It is then declared that the heritable subjects, 'and the bills above enumerated, were granted, and are to be held by me and my foresaids, in security to the said Bank, and to the said respective drawers of the said bills, or such of them as shall come under advance in consequence thereof, according to the several rights and interests of the said Bank and them, but which right and interest of the said drawers and indorsers shall never stand in competition with the interests of the said Bank, of the repayment

Nov. 24. 1825.

1st DIVISION.  
Lord Eldin.

D.

‘of the foresaid sum of £7990,’ &c. An obligation was then introduced to convey the subjects to the drawers of the bills for their relief, in the event of their being required to pay their bills: ‘Declaring, that in the event of the drawers of the said bills, or any of them, being actually in advance previous to the sale taking place as aforesaid, such persons so in advance shall have a right to be consulted in the lotting and selling of the property, but not to impede or obstruct the sale.’ It was also provided, ‘That in the event of death, bankruptcy, or other contingency, rendering any one or more of the drawers of the said bills unable to pay the amount for which he shall be bound, and of no other obligant being immediately substituted by the said William Harley in place of such drawer or drawers, it shall be in the power of me, with consent of the drawers of the bills, if the property be sold in lots, to bring the said subjects to sale at any period three months after either of the above events may take place.’ Fleming was the drawer of one of the security bills to the extent of £500, which was renewed in 1818, 1819, and 1820; but having suspended payments, and no additional security being offered, it was protested by the Bank, and Fleming paid £300 to account. In virtue of the disposition, the Bank had taken sasine; but there was a strict prohibition in the titles against subinfeudations, it being declared that they should be held of the superior Mr. Campbell of Blythswood. No confirmation was obtained, although it was alleged that the Bank was fully aware of the necessity of it. In 1820, the cautioners agreed that the Bank should sell the property so soon as they saw fit; but Harley’s estates having been sequestrated in 1822, his trustee acquired a preferable right, by getting his sasine confirmed. The subjects, however, were liable for arrears of feu-duties to the extent of £1200; and it was stated by the Bank, that a charter of confirmation had been refused by the superior, except on payment of these arrears. Having charged Fleming, prior to Whitsunday 1822, for payment of the balance of his bill, he presented a suspension on the grounds, 1. That the Bank was bound to have renewed the bill, and therefore that the diligence was premature; and, 2. That, by their great and inexcusable negligence, the heritable subjects, in which the guarantees, by the terms of the agreement, had an interest, had been carried off; and therefore that, by the act of the Bank, they had been placed in a worse condition than had been contemplated. To this it was answered, 1. That the bills were only to be renewed in the event of the obligants remaining solvent; and that, as Fleming had not remained in this situation, the Bank was not only not bound to renew the bill, but

was entitled to proceed with diligence; 2. That it was the duty of the debtor and his guarantees to see that the heritable security, which they offered in consideration of the advance, was available to the creditor;—that the circumstance of the creditor being deprived of it by a flaw in the titles could not discharge their personal obligation;—that, in this particular case, the titles could not have been completed without a large advance being made, which the Bank could not be required to do;—and that it was therefore the fault of the debtor and his guarantees that the heritable security had not been rendered available; but that nevertheless the Bank was willing to account for the price of the subjects in the same manner as if the security had been rendered complete prior to the preferable title acquired by the trustee, and according as the price should be ascertained by the sale to be made by him. The Lord Ordinary found the letters orderly proceeded, and the Court adhered.

**LORD HERMANN.**—The interlocutor is perfectly right. There were two securities, and it was expressly provided that the one should be without prejudice to the other. Fleming then becomes insolvent, and the Bank was consequently entitled to put their personal obligation in force. The terms of the deed are quite explicit, and cannot be overcome.

**LORD BALGRAY.**—I am of the same opinion. It is impossible to get over the terms of the deed. The bills and the heritable subjects were to be held as corroborative securities, the one without prejudice of the other. Heritable security was offered to the Bank; and the plea truly is, that it was not given. It is impossible that the Bank, by being deprived of one security, can be held to have lost the other.

The other Judges concurred.

*Suspender's Authorities.*—(2.)—*Thomson v. the Bank of Scotland*, 1824, (House of Lords); *Paisley*, Jan. 13. 1779, (8228); *Un. of Glasgow*, Nov. 18. 1790, (2104, and *Bell's Cases*, 184); *M'Laggan and Company*, Nov. 19. 1813, (F. C.)

**CAMPBELL and MACDOWALL.**—**J. DUNDAS**, W. S.—Agents.

No. 179.

J. A. THOMSON, Pursuer.—*Moncreiff—Alison.*G. SIMSON, Defender.—*Sol-Gen. Hope—Bruce.*

*Superior and Vassal—Entry of Singular Successor—Teinds.*—In calculating the year's rent to be paid to the superior for entry of a singular successor, the vassal is entitled to deduct a fifth of the rent as teind, notwithstanding the existence of a decree of valuation.

Nov. 24. 1825.

2d Division.

Lord Macken-

zie.

M'K.

THOMSON was superior of the lands of Letham, the teinds of which were held of the Crown, and had been valued in 1771. These lands having been sold to Simson, and the superior having raised an action of non-entry, Simson stated his willingness to enter; but contended that he was entitled to deduct from the year's rent, to be paid the superior, one fifth as the value of the teind. Thomson, on the other hand, maintained that no more than the valued teind could be deducted; and he argued, that as his right to a year's rent was an equivalent for his actually entering into possession of his vassal's lands, and enjoying a year's beneficial possession, as if they had reverted to him, he was entitled to all that his vassal could have drawn in the character of proprietor of the lands; and that the effect of a valuation was to fix the extent of the produce which was to be considered as teind in all time to come. To this it was answered, 1. That the teind of lands formed a separate estate, in which the superior had no interest, and the valuation of which was, quoad him, *res inter alios acta*, to which he could not be a party, and from which he could therefore derive no benefit; and, 2. That it was the universal practice of the country to deduct one fifth for the teind, whether valued or not. The Lord Ordinary (Pitmilley) directed queries as to the practice to several of the most eminent agents in Edinburgh, who agreed in stating this practice to be uniform and immemorial. Thereafter the cause having come before Lord Mackenzie, he found, 'That the defender is bound to pay to the pursuer, for an entry to the lands libelled, one year's rent thereof, under deduction of the valued teind, but not of any greater sum on account of teind.' Against this interlocutor Simson reclaimed, and founded on an unreported decision by the First Division in the case of Reid against Fullerton, which had not been brought under the Lord Ordinary's consideration, but in which the Court had expressly found that the deduction must be a fifth part of rent, and not the amount of teind as fixed by a valuation. The Court unanimously altered, and found that Simson was entitled to deduction of a fifth part of the rent in name of teind.

The Lord Ordinary observed in a note :—The superior is entitled, for a change of vassal, to one year's rent of the estate held of him,—*i. e.* of the land, with all its pertinent. One pertinent is the right of holding the teinds at a valuation,—a pertinent annexed by statute to the property of land, but not granted as a separate estate to any set of persons. This pertinent is held of the superior, just as much as any other part of the right of landed property. It is carried by his charter of the land. It decends to the destination of heirs therein contained. It passes by his precept of clare constat. It falls to him by forfeiture, *ob non solutum canonem*, and by non-entry. And if the right to obtain a valuation be a pertinent held of the superior, so must the right in the valuation when obtained. The idea that the benefit of valuation of teinds is a separate estate, not held of the superior of the land, seems to the Lord Ordinary quite inadmissible. If it be not held as a pertinent of the lands, of what superior is it held? Or is it allodial, not descending to feudal heirs at all, and passing without service or infeftment, while the lands do not so pass? Is it conquest in the landholder first obtaining it, though the land be heritage? The Lord Ordinary can see no ground to doubt that this benefit is pertinent of the land, and held of the superior of the land; and that just as much when the valuation is subsequent to the feudal grant, as when it is prior to it. He conceives, on the other hand, that *à contra* the liability to valuation is a quality of the teinds which affects their whole value as a fee, where teinds are feudally granted. The superior of an estate of teinds could never demand, for a change of vassal, the price of the *ipsa corpora* after the teinds were valued; and yet surely the two superiors between them must have right to the full rent. The Lord Ordinary may add, that he does not see on what principle, if the valuation were rejected, one fifth of the present rent could be taken as the value of the teind. If the statutes relative to valuations are to be left out of view altogether in questions between superiors and vassals, where is the authority for taking the teind as equal to one fifth of the rent? Practice now seems rather to favour the defender's argument. But it is a case where practice is of inferior weight, because superiors often use their rights with less than full legal rigour; and the other reasons assigned for the practice seem to the Lord Ordinary not solid, *viz.* that a valuation is *res inter alios acta* in regard to the superior either of lands or of teinds, and that it was not allowed for the benefit of the superior. He conceives that the valuation legally led is good for and against all parties having any right to either land or teinds; and that it was intended by the statute to increase the value of all landed property, for the benefit of all parties interested in that increase.

Lord PITMILL.—Though moved by the reasoning in the Lord Ordinary's note, it has not satisfied me that his judgment is well

founded. The case of Reid, decided by the First Division, is exactly in point; and this is a question as to which it is of more importance to follow precedent, than to resort to principle. That decision also is founded on a course of practice, than which nothing can be more complete. Even on principle, there is a great deal to support the defender's plea, a valuation not being intended to regulate matters with the superior, who is no party to it. The question, however, cannot now be considered open.

The other Judges concurred; and the Lord Justice-Clerk stated that Lord Robertson, who was absent from indisposition, entertained the same opinion.

*Defender's Authorities*.—A. S. Feb. 8. 1748; Magistrates of Inverness, Jan. 3. 1771, (9800); Reid v. Fullerton, March 3. 1819, (not rep.)

J. WAUCHOPE, W. S.—J. YULE, W. S.—Agents.

## No. 180.

MARGARET SIM, Suspender.—*Wilson*.

A. GIBB and Others, Chargers.—*Maidment*.

*A. S. Aug. 11. 1788*.—A suspension of a decree in absence, founded on a bill granted by a married woman, having been passed, held competent.

Nov. 25. 1825.  
1st Division.  
Lord Meadow-  
bank.  
D.

SIM, a married woman, accepted a bill for £7. 7s. on which a decree in absence was pronounced against her by the Sheriff of Stirlingshire; and a charge having been given to her, she presented a bill of suspension. The chargers contended that it ought to be refused in terms of the A. S. 11th August 1788, and a remit made to the Inferior Court to hear the suspender, on payment of the previous expenses. Lords Craigie and Mackenzie, however, passed it without caution or consignation. When the letters came to be discussed, the chargers objected that the suspension was incompetent; and the Lord Ordinary having reported the case, the Court repelled the objection.

The Judges were unanimously of opinion that the A. S. did not apply to a case of this nature.

J. PATTISON JUN. W. S.—J. BROWN, W. S.—Agents.

J. M'DONALD, Advocate.—*Henderson.*

No. 181.

Sir W. JARDINE, Respondent.

*Tack—A. S. Dec. 14. 1756.—Irritancy of a tack under the A. S. 14th December 1756, purgeable by consignation of the arrears before extract, without finding caution for the rent of the five <sup>succeeding</sup> preceding crops.*

M'DONALD, tenant of a farm belonging to Sir William Jardine, having fallen a year's rent into arrear, Sir William raised an action of irritancy and removing, under the A. S. 14th December 1756, before the Sheriff of Dumfries. The Sheriff having ordained M'Donald to find caution for the rent of the next five crops, and on failure to remove, he tendered payment of the arrears; which having been refused, he consigned the amount in a bank, but did not find caution for the five succeeding crops. The Sheriff having, in respect of his failure to do so, decerned in the removing, M'Donald presented a bill of advocation, which was reported verbally by the Lord Ordinary, who proposed to remit to the Sheriff with instructions 'to find that the irritancy was 'purgeable at the bar before extract;—that consignation was 'equal to a timely purging of the irritancy;—to recal his inter-locutor, to authorize payment of the arrears from the sum in 'the bank, and to find the tenant liable in the expenses prior, and 'entitled to those subsequent to the consignation.' The Court unanimously approved of the proposed instructions, and directed his Lordship to remit accordingly.

Nov. 25. 1825.

2d Division.  
Bill-Chamber.  
Lord Medwyn.

W. STEWART, W. S.—GIBSON and OLIPHANT, W. S.—Agents.

D. ARNOT, Advocate.—*Shaw.*

No. 182.

J. THOMSON, Respondent.—*Forsyth.*

*Process—Bill-Chamber.—The reclaiming days in the Bill-Chamber run from the date of the interlocutor, although no certificate of refusal has been issued.*

The Lord Ordinary having refused a bill of advocation presented by Arnot, he reclaimed; but his petition was not lodged till after the lapse of eight sederunt days from the date of the interlocutor. The petition having been objected to as incompetent, Arnot contended, that as there had been no certificate of refusal issued, it was competent to reclaim at any time before this was done; and that in practice the criterion of finality was considered to be regulated by the issuing of the certificate. The Court, however, unanimously refused the petition as incompetent.

Nov. 25. 1825.

2d Division.  
Bill-Chamber.  
Lord Medwyn.  
B.

J. PEDIE, W. S.—W. RENNY, W. S.—Agents.

No. 183.

A. CORRIE, Suspender.—*Whigham.*J. BARBOUR, Changer.—*Marshall.**Bill of Exchange.*—A bill of suspension of a charge on a vitiated bill passed simpliciter.

Nov. 26. 1825.

1st Division.

Bill-Chamber.

Lord Medwyn.

D.

CORRIE having been charged as indorser of a bill apparently dated 8th October 1819, presented a bill of suspension, on the ground that it was ex facie vitiated, the date having been originally 1st October 1819. The Lord Ordinary passed it on caution; but the Court, on hearing parties in terms of the late Judicature Act, passed the bill simpliciter.

The Judges were satisfied that the bill was vitiated; and that although it might form an adminicle of evidence in an ordinary action to instruct a debt, yet it could not be made the foundation of summary diligence.

R. WELSH,—W. DALRYMPLE,—Agents.

No. 184.

J. M'DONALD, Pursuer.—*Carlyle.*A. M'INTOSH, Defender.—*A. M'Neill.*

*Cessio Bonorum*—*Citation.*—Held,—1.—That a debtor in titulo to raise a process of cessio, although, before the expiry of a month from the date of his incarceration, his creditors had consented to his liberation, the warrant of liberation not having been signed till the month's imprisonment was completed;—and,—2.—That a citation to some of the creditors to appear on the 'days mentioned in the summons,' where the diet of compareance was left blank, was fatal to the process.

Nov. 26. 1825.

2d Division.

M'K.

M'DONALD was imprisoned for debt in the jail of Inverness on the 23d November 1824. On the 4th December an aliment was modified to him under the Act of Grace; and on the 13th. the incarcerating creditors lodged a minute, consenting to his liberation, on his granting in their favour a disposition omnium bonorum, containing a special conveyance of certain debts and books referred to in his deposition. The Magistrates, 'not conceiving this sufficient authority for his liberation,' (as stated in their certificate of imprisonment,) did not grant warrant for liberation till the 24th December. Having subsequently obtained an interlocutor granting him the benefit of a cessio bonorum, M'Intosh, one of his creditors, presented a petition, praying to have the process dismissed, on the grounds, 1. That M'Donald's imprisonment after the consent to his liberation; when he had been only about three weeks in jail, must be considered as voluntary, and not sufficient to entitle him to raise a cessio; and, 2. That the execution of citation against certain creditors in England stated



that they were cited to appear, not on any fixed diet, but on the 'days as mentioned in the said summons,' in which the diet of compareance was, as usual, left blank. The Court, although they unanimously repelled the first objection, yet, 'in respect of the irregularity of the citations,' recalled the interlocutor finding M'Donald entitled to the benefit of the cessio, and dismissed the action.

*Defender's Authorities.*—(1.)—2. Bell, 569; Smith, March 9. 1798, (F. C.)

R. LOCKHART,—J. MACDONELL, W. S.—Agents.

J. GORDON and C. M'DONALD, Suspenders.—*Skene.*

No. 185.

EARL of FIFE, Charger.—*Ivory.*

*Title to Pursue—Landlord and Tenant—A. S. Dec. 14. 1756.*—Held,—1.—That trustees for behoof of the creditors of a tenant, under a tack secluding assignees, are entitled to pursue a suspension of a decree of irritancy of the tack, so as to preserve their right to claims due to the tenant for meliorations, &c. at the end of the lease; and, 2. That a tenant, being interpellated by diligence from payment of rent, is not liable to have his lease irritated under the A. S. Dec. 14. 1756, as being in arrear of rent.

GEORGE ALEXANDER held a farm from the Earl of Fife by a lease secluding assignees, which provided that he should be repaid, at the end of the lease, certain sums advanced by him to the outgoing tenant for buildings &c., and the value of such meliorations as he should make on the farm. After having expended a considerable sum, he fell into arrear a year's rent, on which Lord Fife raised an action of irritancy and removing, under the A. S. 14th December 1756, before the Sheriff of Banffshire, and obtained decree in absence. Shortly before this, Alexander had executed a trust-deed for behoof of his creditors in favour of Gordon and M'Donald, not assigning his lease, but conveying generally all his rights and estate; and on Alexander receiving a charge on the decree in absence to remove, they presented a bill of suspension on the ground that the decree was irregular, in respect that, prior to the raising of this action, certain heritable creditors of Lord Fife had entered into possession of the lands, and had served Alexander with a summons of mails and duties; and that arrestments of the rents had also been used in his hands, whereby he was interpellated from making payment of the rent to his Lordship. The Lord Ordinary having refused the bill, and found the trustees liable in expenses, they presented a reclaiming note, and stated that they only insisted in the suspension to the effect of preserving to the creditors the claim for meliorations competent to Alexander, which would be lost by

Nov. 26. 1825.

2d DIVISION.  
Bill-Chamber.  
Lord Mackenzie.

the irritancy, but not to the effect of maintaining Alexander in possession, and would therefore be satisfied with a reservation of their claims. This arrangement was agreed to on the part of Lord Fife, who however contended that the trustees had no title to present the bill;—that there were not sufficient reasons of suspension; and that therefore they had been rightly subjected in expenses by the Lord Ordinary. The Court remitted to his Lordship ‘to refuse the bill of suspension, in so far as it relates to the possession of the farm, reserving all claims competent to the suspenders under the lease, for meliorations or otherwise, in the same way as if no decret of irritancy had been pronounced against the tenant; and to recal the findings as to expenses in the interlocutors reclaimed against.’

Their Lordships were unanimously of opinion that the trustees had sufficient title and interest to appear in their own name; and that if the arrangement as to the reservation of their claims had not been gone into, the bill must have been passed in respect of the irregularity of the decree.

J. HUNTER, W. S.—INGLIS and WEIR, W. S.—Agents.

No. 186. G. SUTHERLAND, Suspender.—*Jeffrey—Cockburn—Matheson.*  
M. MACKENZIE, Changer.—*Ivory—A. McNeill.*

*Process.*—The Court refused to prohibit a certificate of refusal of a bill of suspension from being issued till after the meeting of Parliament, to enable the party to present a petition of appeal.

Nov. 29. 1825. A dispute having occurred between Sutherland and Mackenzie, relative to their rights of fishing in the Cassley in the county of Sutherland, Mackenzie presented a petition to the Sheriff, praying for an interdict against Sutherland drawing or fixing his nets in a particular part of the river. The Sheriff having granted interdict, and Sutherland having presented a bill of suspension, the Lord Ordinary remitted to the Sheriff to recal his interlocutors, and to find Sutherland entitled to a possessory judgment. To this interlocutor the Court adhered, under a certain limitation; and Mackenzie then offered a petition, praying the Court to prohibit the clerk from issuing a certificate till the sixth sederunt day of the next Parliament, in order that he might have an opportunity of entering an appeal. The Court refused the petition without answers.

1st DIVISION.  
Bill-Chamber.  
Lord Eldon.

D.

J. MACDONELL, W. S.—J. MOWBRAY, W. S.—Agents.

**M. MACKENZIE, Suspender.—Rutherford—A. Wood.**

**No. 187.**

**BRITISH LINEN COMPANY, Chargers.—R. Bell.**

*Proof—Bill of Exchange—Stamp.*—An offer to prove by the agent of a bank, to whom, in his private capacity, an accommodation bill had been granted, originally expressing the value as 'in account,' but to which was afterwards added, 'for business,' held inadmissible.

MACKENZIE accepted a bill in favour of Mitchell, (who was the agent of the British Linen Company at Tain); and Mitchell having indorsed it to that company, a charge was given to Mackenzie. Of this he presented a bill of suspension, stating that the bill had been granted for the accommodation of Mitchell, (of which he produced evidence);—that originally the value was expressed in the words 'value in account;' but that subsequently, and without his knowledge, the words 'for business' had been added. He therefore contended that this was such a material alteration as to destroy its validity, and that, at all events, it rendered a new stamp necessary. To this it was answered, that there was no evidence that such an *ex post facto* addition had been made, and that even although there had been so, yet it was not material; and as the bill was confessedly an accommodation to Mitchell, and the allegation was that the addition had been made by him, this could not affect the validity of the bill, seeing that until he indorsed it away, it could not be considered to have been used by him; and that, in these circumstances, no new stamp was requisite. The Lord Ordinary refused the bill; and Mackenzie having reclaimed, the Court, before answer, appointed him 'to give 'in an articulate condescendence explanatory of the alleged alteration on the bill charged on, with the mode of proof, and the 'period when such alteration was made.' In reference to this, Mackenzie stated that the addition had been made by Mitchell, after he had indorsed the bill to the bank; and he offered to prove this by Mitchell's oath. The Court, however, without delivering any opinion as to the relevancy of the allegation, but being satisfied that the evidence offered was inadmissible, adhered.

*Suspender's Authorities.*—10. East, 441; Chitty, 135; Baillie, 91; 4. T. R. 320; 3. Esp. 346; 15. East, 412; 3. Camp. 1; 1. T. R. 587; 15. East, 412; 1. Dowl. and Ryl. 382; Barn. and Ald. 679; 2. Stark, §13.

*Chargers' Authorities.*—1. Dowl. and Ryl. 332; Chitty, 111; 1. Bell, 302; 10. East, 436.

**J. MACDONNELL, W. S.—CORRIE and WELSH, W. S.—Agents.**

Nov. 29. 1825.

1ST DIVISION.

Bill-Chamber.

Lord Craigie.

D.

No. 188.

Mrs. M'LANE, Pursuer.—*Bell—Greenshields.*  
J. W. ROBERTON and D. KENNEDY, Defenders.—*Sal-Gen.*  
*Hope—Jardine—Skene.*

*Bankrupt—Sequestration—Heritable Creditor.—Held,—1.—That heritable property conveyed to a trustee under the bankrupt act can only be sold under burden of the securities over it;—2.—That a purchaser is not relieved from them by paying the price to the trustee;—and,—3.—That an heritable creditor is not liable for any part of the expenses of a sequestration, nor of the sale of the heritable property, where the sale is not beneficial to the creditor.*

Nov. 29. 1825.

1st Division.  
Lord Alloway.  
D.

THE estates of Robert Archibald, builder in Glasgow, having been sequestrated under the bankrupt act, Kennedy was appointed trustee. He had no personal funds, his property consisting entirely of houses in Glasgow. Over these he had granted annuities, which the rents were originally fully adequate to pay; but, at the period of the sequestration, they were not so. Among others, Mrs. M' Lane and Miss Baillie had annuities secured to them; but there were three other preferable annuitants. The trustee exposed the houses to public sale under certain conditions of roup, and particularly that the purchaser should be bound to pay the price to him; reserving to the purchaser 'to see to the application of 'the purchase-monies towards extinction pro tanto' of the securities, in terms of the statute. The property was purchased by Robertson, who accordingly paid, the price to the trustee, by whom part of it was applied in buying up and discharging the securities which were preferable to Mrs. M' Lane and Miss Baillie. The trustee having insisted on retaining the balance in payment of the expenses of the sequestration, (amounting to £1500,) a multiplepoinding was raised in his name, and Mrs. M' Lane brought a poinding of the ground, in virtue of her heritable right of annuity. In support of this action she contended, that, notwithstanding the sale by the trustee, her heritable right remained unaffected;—that in the circumstances the sale was improper, and highly prejudicial to the heritable creditors, seeing that it could only be productive of loss to them, and could be of no advantage to the personal creditors, because it was impossible that any balance could be realized after paying the value of the annuities; and that she was not liable in the expenses of the sequestration generally, nor of the sale which had been prejudicial to her. To this it was answered by Robertson, 1. That Mrs. M' Lane had consented to the sale by means of her agent, and therefore that she was barred from objecting to it; and, 2. That he had paid the price to the trustee, whose discharge was sufficient to clear off the heritable securities; and that, consequently, he could not be made

responsible from the circumstance of there not being adequate funds to pay these securities. By the trustee it was contended, that it had been settled by various decisions, and particularly by that of *Goodwin v. Brown*, that where there is a deficiency of funds to defray the expenses incurred under a sequestration, creditors heritably secured are liable pro rata for the sums which they recover, and that the same rule ought to be applied to this case.

The Court, on the report of the Lord Ordinary, found 'that the sale in question is not valid, in so far as the same is pre-judicial to the heritable creditors; and that the subjects sold still remained, notwithstanding such sale, under the burden of the rights and interests affecting the same.'

Robertson and the trustee having reclaimed, and the former having produced certain new documents, the Court remitted the case back to the Lord Ordinary. When it came before his Lordship, and in reference to a statement at the Bar, he required Mrs. M'Lane to specify in a minute 'the sum she is willing to accept as the condition and consideration for her signing and delivering the disposition, and renouncing her annuity;' appointed Robertson and the trustee 'to state specifically when they are ready and willing to pay that sum, or what other sum, as the consideration,' and again reported the case to the Court. The parties, however, being unable to agree as to the sum, the Court adhered to their former interlocutor, so far as regarded the findings therein expressed; and further found that 'the said J. W. Robertson, and the subjects purchased by him, must, notwithstanding the sale and purchase, still remain liable to the annuitants, in terms of their securities, for the same; but reserving to the petitioner J. W. Robertson his relief against the trustee, as accords; and further find that no part of the expenses of the sequestration are to fall upon and be paid by the annuitants; and decern accordingly.'

At the first advising, some of the Judges were of opinion that Mrs.

M'Lane had, by her agent, consented to the sale; but they were at last unanimously of opinion that this was not the case, and that therefore the general question remained to be decided, Whether the heritable creditors could be deprived of their securities by means of a sale by the trustee? In relation to this point, the Judges were agreed that heritable creditors stood in a different situation, under the present statute, from what they formerly did, as they had now no vote in the sequestration;—that it was therefore clearly the intention of the Legislature that their rights should remain unaffected by the acts of the trustee; and that if a sale of the heritable property was carried into effect, it could only be under the

burden of their securities, so that the property still remained liable for them, or the purchaser was bound to see the price paid to them, and their securities discharged. They were also of opinion that they were not liable generally for the expenses of the sequestration, and that it was impossible to find Mrs. M'Lane in this case liable for any part of the expenses of the sale, seeing that it was a measure that was not only not beneficial, but prejudicial to her.

*Pursuer's Authorities.*—2. Bell, 446; 54. Geo. III. c. 187. §42.

*Defender's Authorities.*—Goodwin, Feb. 1. 1815, (F. C.); Crawford, March 8. 1817, (F. C.); 2. Bell, 433.

HUNTER, CAMPBELL, and CATHCART, W. S.—A. YOUNGSON, W. S.—  
J. KENNEDY, W. S.—T. DARLING,—Agents.

No. 189. MRS. EUPHAN JOHNSTONE and HUSBAND, Pursuers.—*Dean of F. Cranstoun—More.*

D. PATERSON, Defender.—*Moncreiff—Fullerton—Paterson.*

*Homologation—Legitim.*—A party having for several years accepted the interest due annually on certain provisions left her in her father's deed of settlement, and declared to be in lieu of legitim, &c. found not to be barred of her right of election, in respect she was all the time entirely ignorant of the amount of her claim of legitim.

Nov. 29. 1825.

2d DIVISION.  
Lord Cringollic,  
F.

THE late Mr. Cochrane senior had one son and three daughters, one of whom was the pursuer Mrs. Johnstone. On her marriage Mr. Cochrane gave her £100, and in 1804 he executed in her favour a disposition of a house in Musselburgh. In this deed he reserved his own liferent and a power of revocation; but in 1809, three years before his death, he delivered the deed, and put Mrs. Johnstone and her husband in possession of the property. In the same year he executed a deed of settlement, proceeding on the narrative of the disposition above mentioned, to which it specially referred, and of similar dispositions in favour of his other daughters. By this settlement he conveyed his whole property to his son, under certain burdens, and, inter alia, 'of the payment of the following additional provisions, viz. to Mrs. Euphan Cochrane otherwise Johnstone, my daughter, in liferent, and to 'the child or children of her body equally in fee, of the sum of '£1500,' and other sums to Mrs. Brown, his only other surviving daughter, and to the children of his daughter deceased. The deed declared these provisions to be 'in lieu and in full satisfaction to them respectively of all bairns' part of gear, legitim, 'executry, and other legal and conventional claims or demands 'of whatever nature, or however constituted, arising or compe-

'tent to all or any of them against me or my representatives, or out of my estate, real or personal; excepting always the special dispositions, before referred to, of certain subjects in Musselburgh.' By codicils Mr. Cochrane left to Mrs. Johnstone an additional £100 and £400 to her children, to be liferented by her, £800 of which two sums was payable two years after his death, and carried interest only from the term of payment, the other £200, and the provision of £1500, bearing interest from the first term which should be a year after his death. Mr. Cochrane died in April 1812, so that interest on £1700 of the provisions ran from Whitsunday 1812, and on the remaining £300 from Whitsunday 1814. A copy of the settlement was, immediately after Mr. Cochrane's death, communicated to Mr. and Mrs. Johnstone, who, at Whitsunday 1814, accepted from Cochrane junior £85, being the exact amount of interest of the £1700; and in 1815 they received from him, in addition, the interest of the £300, which only then became payable. Mrs. Johnstone continued to accept this increased amount of interest regularly for seven years, but never gave any receipts, and was in total ignorance, during that time, both as to the amount of her father's moveable succession, that her mother had renounced her *jus relictæ*, and that her sisters had, in their contracts of marriage, discharged their claim of legitim. In 1820, Cochrane junior having been sequestrated, Mrs. Johnstone raised an action against him, concluding for payment of upwards of £4000 as her share of legitim, under deduction of the yearly payments already received by her. In this action appearance was made for Paterson, the trustee on Cochrane's sequestrated estate, who pleaded in defence, that Mrs. Johnstone, by receiving the yearly interest of the provisions in the deed of settlement, which were declared to be in lieu of all claims of legitim, and by possessing the house in Musselburgh, the conveyance of which was to be considered as part of the general settlement of the deceased, must be held to have homologated that settlement, and to have made her election of the provisions in it. The Lord Ordinary assoilzied the defender, and stated in a note, as the ground of his judgment, that, 'seeing the representers took the interest of the smaller provision due for the first year after their father's death, and then higher interest in the second year, when the provision increased, and so continued to do for seven consecutive years, taking the interest of the increased provision without challenging their father's settlement, he could not reasonably impute their conduct to any other motive than a ratification of their father's will.' Mrs. Johnstone then reclaimed, and contended, 1. That a right of legitim

could only be renounced by an express discharge; and, 2. That the acceptance of the partial payments could not infer homologation, as the sums paid were due, whether she took the provisions or resorted to the legitim, and as she was in total ignorance of the amount of her claim of legitim. To this the trustee answered, 1. That the dicta of the institutional writers, as to a claim of legitim being barred only by an express discharge, applied solely to the case of a renunciation before the father's death, but that after that event, when the claim became a vested right, and the nature of the father's settlements was known, the party thus becoming aware that he is giving up his legitim by taking advantage of the settlements, renunciation might be more easily presumed; and, 2. That the acceptance of the exact sums of interest payable under the deed of settlement could not reasonably be referred to any other cause than homologation of that deed. The Court altered the Lord Ordinary's interlocutor, found that there was no sufficient evidence of homologation, and remitted to his Lordship with instructions 'to take an account of the free executry of the deceased Archibald Cochrane, and to do further as he should see cause;' and they afterwards, on a reclaiming petition, adhered.

**LORD PITMILLY.**—The question here is, whether Mrs. Johnstone is barred by homologation from claiming her legitim? She had the option of resorting to it, or of accepting the provision in the settlement; but she could not exercise that option till she knew the amount of both. She was aware of the amount of the provisions, but she knew nothing of the extent of her claim of legitim; and there can be no homologation, when the party is ignorant of what she is said to have given up. As to the house in Musselburgh, it was made over to her in Mr. Cochrane's lifetime, before the execution of the deed declaring the provisions to be in satisfaction of all claims of legitim, and the taking it cannot possibly infer homologation.

**LORD JUSTICE-CLERK** was of the same opinion.

**LORD ALLOWAY** concurred, and further observed—I cannot assent to the plea maintained by the defender, that renunciation of legitim can be more easily presumed after the father's death than before. On the contrary, when the right which might have been disappointed by the father making his funds heritable is rendered certain by his death, the rules of the institutional writers apply with greater force.

**LORD GLENLEE** entertained a different opinion, and thought that the ignorance of Mr. and Mrs. Johnstone as to the amount of the legitim could not materially affect the question of homologation, as



their election could not be at all influenced by the amount of legitim, but would necessarily be chiefly or entirely regulated by the consideration, whether they ought, by resorting to the legitim, which would vest solely in themselves, to disappoint their children, on whom the fee of a large proportion of the provisions was settled. His Lordship also thought that the children ought to be heard for their interest.

*Parsons' Authorities.*—1. Stair, 10. 11; 1. Bank, 341. 64; 3. Ersk. 3. 48; and 9. 23; 3. Stair, 8. 45; Lawson, Feb. 6. 1777, (Ap. 1. Legitim, 1.)

T. DARLING,—DONALDSON and RAMSAY, W. S.—Agents.

A. GRANT, Petitioner.—*Matheson.*

No. 190.

J. PEDIE, Respondent.—*Shaw.*

*Mandatory.*—Held that a defender who is out of Scotland must sist a mandatory.

PEDIE brought an action against Grant, a solicitor in London, who, although residing in England, was a native of Scotland; and the latter having objected to the jurisdiction, the Court sustained it *ratione originis*. Grant thereupon entered an appeal to the House of Lords, who reversed the judgment, and made a special remit to inquire whether there were any other grounds for sustaining the jurisdiction. Grant then presented a petition to have the judgment applied; but it having been objected that he was not within Scotland, and that no mandatory was sisted, the Court refused to receive the petition without a mandatory.

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J. MACDONELL, W. S.—J. PEDIE, W. S.—Agents.

GLENDINNING and GAUNT.—*Sol.-Gen. Hope—Macfarlane.*

No. 191.

W. WALKER and Others.—*Moncreiff—Jameson.*

Competing.

*Legacy.*—A testator having, by means of a trust-deed, bequeathed £500 to a woman in liferent, and her children in fee, but provided that, in the event of her death without lawful issue, the money should return to and form part of the residue of his estate, and the liferentrix having a son who predeceased her, leaving two children, and she having died—Held that the children of the son were preferable to his creditors.

THE late James Lockhart left a trust-deed and settlement, by which he conveyed his estates, real and personal, to trustees, and by which, after requiring them to secure £500 sterling to Ann Slater in liferent, and, after her death, to the children procreated or to be procreated, he appointed ‘my said trustees to lend out ‘the further sum of £500 sterling on the like security, taking

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‘ the interest thereof payable to Margaret Muter, spouse of William Walker, hardwareman in Glasgow, during her life, and the said sum itself, after her death, to the child or children lawfully procreated or to be procreated of her body, share and share alike.’ Then followed another legacy, in the same terms, to a Margaret Slater; and it was provided, ‘ that in the event of the death of any or all of the said Ann Slater, Margaret Muter, and Margaret Slater, without lawful issue, the sums appointed to be liferented by them respectively shall return to and be upliftable by my said trustees, and shall thenceforward be held by them, and applied in the manner after directed with regard to the residue of my estate.’ The testator was survived by Margaret Muter, who at this time had a son, William Walker, alive. This person however predeceased her, much involved in debt, and leaving two children. On the death of Margaret Muter, Glendinning and Gaunt were confirmed executor-creditors of William Walker; and a competition arose between them and his children for the £500 which had been bequeathed in the terms above quoted. In support of their claim, Glendinning and Gaunt contended that the fee had vested in William Walker by virtue of the terms in which the legacy was bequeathed, and by his having survived the testator. To this it was answered by the children, that it was provided, that if Margaret Muter should die without leaving lawful issue, the money was to return to and form part of the trust-fund;—that if the children had not been alive, this must necessarily have taken place, seeing that, as her son predeceased her, she would have died without lawful issue;—that therefore it was only by virtue of their existence and survivorship that the money ever became payable at all;—that no right ever vested in William Walker, and that accordingly he could never have demanded payment of it, unless he had survived his mother. The Lord Ordinary preferred the children, ‘ in respect that the said William Walker predeceased the said Margaret Muter, and that the legacy of £500 in question did not vest in him; and the Court, on the same ground, adhered.

*Glendinning and Gaunt's Authorities.*—3, Enk. 8. 45; D. of Hamilton, Dec. 9. 1763, (4358); Jamieson, March 2. 1775, (4284); Rutherford, May 30. 1821, (ante, Vol. I. No. 48.)

*Walker's Authorities.*—Baillie, July 23. 1724, (4282); Napier, June 11. 1740, (4314); Beaton, June 30. 1747, (4345); Duncan, June 27. 1809, (P. C.)

1. TOD and WRIGHT, — CAMPBELL and MACDOWALL, — Agents.

W. THOMSON, Pursuer.—*D. Macfarlane.*  
W. LINDSAY and Others, Defenders.—*Ivory.*

No. 192.

*Corporation—Process.*—Held that an action by a member of a corporation against the deacon and boxmaster personally, for repayment of sums paid under the authority of the corporation, is incompetent against them.

IN 1819, at an aggregate meeting of the nine trades of Dundee, (of which the corporation of shoemakers formed one,) it was resolved that a petition should be presented to Parliament on the subject of burgh reform. A committee was accordingly appointed to correspond with a committee of the House of Commons in relation to this matter, and it was agreed 'that a subscription be 'opened among the nine trades for defraying the expense attending the proceedings of the committee.' A meeting of the corporation of shoemakers was in consequence held, and the following resolution was recorded in their minutes: 'The shoemaker trade, 'considering that the nine trades had at their general meeting 'appointed a committee to act along with the guildry committee 'in attending to the matter of burgh reform, presently under 'consideration of a committee appointed by the House of Commons; and considering that expenses of an immediate nature, 'and also presently unforeseen, must be incurred in matters relative to their appointment, do therefore unanimously resolve to 'contribute from the funds of their trade to the amount of £7 'sterling (should the same be required) as their proportion, in 'order to forward a cause so much required, and so universally 'necessary to all the burghs in Scotland, which, from the late 'propitious aspect following Lord Archibald Hamilton's motion 'in the Commons' House, they trust will ere long put an end to 'self-elected magistracy, so long and so justly reprobated.' About the same time it was proposed to make an alteration on the constitution of the aggregate body of the nine trades; and at a meeting it was resolved by them, both in their aggregate capacity, and as separate trades, that this should be done. Three of the trades, being dissatisfied, presented a bill of suspension and interdict, which was passed; and this was followed by an action of declarator and reduction, and by a petition and complaint, in which it was alleged that the other trades had violated the interdict. To these actions the trades who had supported the resolution, and particularly the shoemaker trade, were called as corporations; and they were successful in resisting them, with the exception of the petition and complaint, which was sustained, and £85 of expenses awarded against them. In reference to these actions, it was resolved by the shoemaker trade, agreeably to similar resolutions

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Lord Alloway.  
D.

\* This case was decided on the 30th November 1824, but was accidentally omitted.

by the other trades, 'that this trade shall in the mean time contribute towards the expense of the process £20 sterling;' and again it was further resolved, 'that this trade do now direct the deacon and boxmaster, in conformity with the other trades, to make immediate payment of £17 from the funds of the corporation to the agent for the trades; reserving the claim of the trade against the general fund for payment of the said sum, as well as the £20 formerly voted.'

The shoemakers having been called on to contribute the £7 voted in support of the petition to the House of Commons, it was paid by William Lindsay, deacon, and Thomas Keay, boxmaster of the corporation; and the sums voted in regard to the actions were paid by their successors in office, Peter Dron and William Kirkland, and credit was taken by them in their respective accounts for these payments. An action was then brought by Thomson, as a member of the corporation of shoemakers, against Lindsay and Keay, as former deacon and boxmaster, and Dron and Kirkland, as presently holding these offices, and concluding, 1. That it should be declared that the payment of the above sums was an illegal application of the funds of the corporation, and ought not to have been allowed in their accounts, seeing that the funds were exclusively devoted to charitable purposes; and, 2. That they ought to be ordained to pay back or place the same to the credit of the corporation. Against this action various defences were pleaded; but in particular it was maintained, that as the money had been paid in virtue of the authority of the corporation, which they were not entitled to disobey, and the corporation had power to dispose of their funds as they thought fit, and as they had sanctioned the accounts, the action ought not to have been directed against the defenders, but against the corporation. To this it was answered, that as the funds had been applied to purposes which the corporation had no authority for doing, the resolution was illegal and ultra vires, and consequently the defenders could not protect themselves under that authority. The Lord Ordinary having reported the whole case, 'in respect that the points now under discussion should be at once settled and known to the whole incorporations in Scotland,' the Court, without deciding any of the other points which had been pleaded, 'dismissed the present action, in respect that the proper parties are not called as defenders thereto; assolizied the defenders, who have been made parties, from the whole conclusions of the libel,' and found them entitled to expenses; and thereafter refused a petition without answers.

*Purmer's Authority*.—Wilson, Jan. 16. 1792. (2010.)

T. MEECH, W. S.—RAMSAY and IMRYE, W. S.—Agents.

FERMIN DE TASTET and COMPANY and Others, Complainers.— No. 193.  
*Brown.*

J. M'QUEEN, Respondent.—*Moncreiff—Monteith.*

*Sequestration—Expenses.*—A creditor who has obtained decree for expenses in a litigation with the trustee on a sequestrated estate, is entitled to his dividends, without any part of the expenses on either side being deducted.

HAMILTON and COMPANY, merchants in Glasgow, shipped a quantity of ale, porter, &c. on consignment, to the complainers at Havannah, who, before their arrival, made advances upon them. In consequence of this transaction a dispute arose between the parties, and an action was brought by the complainers against Hamilton and Company for £1300; and Hamilton and Company raised a counter action, concluding for upwards of £3000. The estates of Hamilton and Company having been sequestrated under the bankrupt act, M'Queen, who was appointed their trustee, sisted himself as a party to the actions, and was instructed by a meeting of the creditors to carry them on till their final issue. A long litigation took place; but at last judgment was pronounced, decerning 'against the said Hamilton and Company, 'and against James M'Queen, their trustee,' for payment of the sums concluded for by the complainers, assolzieng them from the counter action, and decerning in their favour for £264 of expenses. These expenses were paid by M'Queen to the complainers; but in his accounts he took credit both for them and for the expenses which he had incurred, and deducted the amount from the funds in his hands. This having been objected to by the complainers, in so far as it could affect the amount of the dividend payable to them; the trustee and commissioners found that they had no right 'to object to any of 'the sums for which he, the trustee, had taken credit in his account of intromissions.' Against this decision the complainers presented a petition to the Court, and contended that it was unjust, and contrary to equity, that the law expenses which had been incurred by the creditors in prosecuting their claims, and in resisting those of the complainers, should be charged against that fund, out of which they were entitled to payment of their dividend; and still more so, that those expenses which had been awarded to them should be deducted from the fund of division; and thereby to diminish their dividend. To this it was answered, 1. That the trustee had been instructed by a regular meeting of the creditors to prosecute and defend these actions, which was a sufficient authority for disbursing the expenses; and

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that as this resolution had not been complained of within thirty days, it was final and conclusive; and, 2. That all expenses incurred with a view to enlarge a trust-fund, or to defend it, were invariably paid out of it, and that there was no distinction with regard to a trust under the bankrupt statute. The Court, however, found 'that no part of the expenses incurred in the litigation within mentioned falls to be charged against the sequestrated estate, or to affect the petitioners' dividend out of the funds;' and found the complainers entitled to expenses.

**LORD HERMANN.**—The decision by the trustee is plainly unjust; for it resolves into this, that when a trustee brings an unfounded action, and expenses are awarded against him, he is entitled to charge both these expenses, and those which he himself has incurred, against his successful opponent. This, however, cannot be permitted.

**LORD GILLIES.**—The creditors were, in relation to the complainers, third parties, and are not entitled to charge them with any part of the expenses.

In these opinions the other Judges concurred.

*Complainers' Authorities.*—Gibb and Co., Nov. 26. 1821, (ante, Vol. I. No. 269); Scott, June 12. 1822, (ante, Vol. I. No. 532.)

J. CRAWFORD, W. S.—J. HAMILTON, W. S.—P. CAMPBELL,—  
Agents.

No. 194. **T. CHAPMAN and Others, Complainers.**—*Sol.-Gen. Hope—Whigham.*

**R. DODDS and Others, Respondents.**—*Moncrieff—McNeill.*

*Sequestration—Trustee—Held.*—1.—That a commissioner on a sequestrated estate is entitled to call a meeting of the creditors to remove a trustee;—and,—2.—That a majority at such a meeting may remove the trustee without assigning cause.

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THE estates of George Comb having been sequestrated under the bankrupt act, Chapman was appointed trustee. A composition was thereafter offered by the bankrupt, and it was accepted by several of the creditors at a meeting held for that purpose; but Chapman being of opinion that it had not been agreed to by the statutory majority, made a report to that effect, and opposed an application by the bankrupt for approval of the composition, on the ground that it was inadequate, and that it was endeavoured to be carried by the influence of the bankrupt's relations. During the discussion of this question, a requisition was addressed to the trustee and commissioners on the 1st June 1825, in these terms:—  
'We the subscribers, creditors, or agents or mandatories for creditors of George Comb, tenant in Redhaugh, request that

‘the trustee and commissioners on his sequestrated estate, or either of them, would be pleased to call a general meeting of the creditors to remove the trustee, and to elect another trustee in his place, who will pay attention to the interest and the wishes of the general body of the creditors.’ In consequence of this requisition, one of the commissioners published an advertisement in the London and Edinburgh Gazettes, calling a meeting to remove the trustee, and to elect another trustee in his place. A meeting was accordingly held, and it was ‘moved that the present trustee be removed from his office in terms of the advertisement; and the motion having been seconded by Mr. George Goodlet, was carried with the approbation of the whole creditors and doers for creditors present, excepting Messrs. Tweedie, Cleghorn, Chapman, and Goodsir. The meeting accordingly removed, and do hereby remove, the said Thomas Chapman from his said office of trustee’ on the said sequestrated estate. After having done so, the meeting elected Robert Dodds to be trustee, and gave him instructions as to the execution of his office. Against these proceedings Chapman and the minority afterwards protested, and presented a petition and complaint to the Court, praying to have it found that the meeting, and the resolutions and other acts thereof, were incompetent and illegal. In support of this conclusion they contended, 1. That a single commissioner had no authority to call a meeting for removal of the trustee, seeing the power of the commissioners to call general meetings was limited to a particular class specified in the statute; and, 2. That supposing the meeting had been regularly called, it was not competent to remove the trustee, even by a vote of the majority, without cause shown; because, although it was enacted by the 71st section, ‘that a majority of creditors at any meeting to be advertised for the purpose shall likewise be entitled to remove or to accept of the resignation of any trustee,’ yet this enactment was coupled with the previous one, ‘that it shall be competent for one fourth of the creditors to apply summarily to the Court of Session for having the said interim factor or trustee removed, upon cause shown;’—that it was therefore the intention of the Legislature that in both cases cause must be shown, and that the only privilege which was conferred on a majority was of doing so without the interference of the Court. To this it was answered, 1. That the power of a commissioner to call meetings of the creditors was rendered perfectly general by the 35th section, and consequently that the meeting for removal of the trustee was regular. 2. That it was not necessary for a majority of the creditors to show

cause for removing the trustee, but that they were entitled to do so without any explanation of their reasons. The Court, after being much divided in opinion, and taking time to consider, refused the petition, and dismissed the complaint so far as related to the removal of the trustee, but sustained it as to the election of Dodds; and at the same time refused a petition presented by him for confirmation, and appointed the Sheriff-clerk to take the interim management of the estate.

**LORD HERMAND**, at the first advising, stated—I am not satisfied that a majority of the creditors can remove the trustee without cause being assigned. If he can be removed merely out of caprice, or from some worse cause, it appears to me that the power is most extraordinary, and that it ought not to be supposed that it was the intention of the Legislature to confer it. This case affords a complete example of the inexpediency of giving such a power. It is plain that a family junto has been formed to carry through a composition, which the trustee properly resists; and the object of removing him is, that his opposition may be effectually taken away. The statute is certainly ambiguous, and therefore I am entitled to inquire what was the intention of the Legislature. Now, it certainly could never intend to sanction such a proceeding as this, and to bestow such a despotic power on the majority of the creditors as is contended for. Besides, the word 'likewise' in the statute clearly couples the last part of the sentence with the former, in which cause is required to be shown.

**LORD BALGRAY**.—I am of a different opinion, and I think that the statute does bestow a despotic power on the majority of the creditors at a regular meeting to remove the trustee. The Legislature left it to them to attend to their own interests, and the statute is perfectly clear. The power of one fourth in number is put in contradistinction to that of the majority. The former must show cause to the Court for removing the trustee; and if we are satisfied that there is cause for doing so, we must remove him. But contrast this with the power bestowed on a majority. The words are, that 'they shall likewise be entitled to remove' without any qualification, and that power is vested in the creditors, and not in the Court. On the other point of the case, I am also clear that any one commissioner is entitled to call a meeting for removal of the trustee. The commissioners are authorized by the 35th section to meet, when they think fit, to make reports to a general meeting of the creditors, and they, or 'any one of them, are empowered' to call these general meetings; and a similar power, in relation to the absence of the trustee from Scotland, is conferred by the 25th section. In this case I cannot see that there is any imputation



against the trustee; but that is a matter which we are not entitled to take into consideration.

**LORD CRAIGIE.**—I should wish to concur in the opinion delivered by Lord Hermand, because I am satisfied that the trustee is doing his duty, and that the prayer to remove him proceeds from the relations of the bankrupt; but I am afraid that Lord Balgray is right in point of law, and that a majority may remove without assigning cause. On this point, however, and also on the other, I should wish to have further time to consider; but it appears to me, that if the creditors who resist the removal can show that the majority are acting from an improper motive, the Court may interfere.

**LORD GILLIES.**—I am also reluctantly obliged to state it as my opinion, that a majority of the creditors at a meeting regularly called may remove, without cause being assigned. I, however, doubt whether this meeting has been regularly called. On attending to the statute, it will be seen that the power of a commissioner to call a meeting is confined to a special class of cases; and as they are anxiously enumerated, we cannot hold that he has a power to call meetings generally. On this point, however, I have not yet been able to form any decided opinion.

**LORD PRESIDENT.**—I am also disposed, if possible, to support this trustee; but the law appears to me so very clear, that I am afraid we cannot do so. There is a plain contrast between the power of one fourth of the creditors and a majority, the former of whom are required to satisfy the Court that there is cause for removing the trustee; whereas it is declared that the majority may, without any application to us, remove the trustee. I also am of opinion that a commissioner may call a meeting for his removal; and indeed, if it has not been otherwise decided, I should be disposed to hold that a creditor might call such a meeting. No doubt, there is a provision that the trustee may be required to call such a meeting, and perhaps a high-minded trustee may comply with this request; but in the great majority of cases this will not be done, and therefore there must be a power in some other party interested. It has also been contended that an application may be made to the Court for authority to call such a meeting; but there is no authority in the statute to that effect. Authority, however, is distinctly given to any one of the commissioners to call a general meeting, and therefore I am of opinion that the present one was perfectly regular.

After the Court had taken time to consider, and at the second advising, the Lord President stated that the Court were now unanimously of opinion, 1. That the meeting had been regularly called; and, 2. That it was not requisite for a majority at such a meeting to assign any cause for the removal of the trustee.

*Complainers' Authorities.*—(1.)—54. Geo. III. c. 137. § 23, 24, 25; 2. Bell, 393.—(2.)—§ 71; 2. Bell, 413; Douglas and Co. Dec. 21. 1821, (ante, Vol. I. No. 217); 2. Bell, 412.401.

*Respondents' Authorities.*—(2.)—Wallace, May 27. 1824, (ante, Vol. III. No. 48); 2. Bell, 412; 54. Geo. III. c. 137. § 71.

A. GOLDIE, W. S.—C. C. STEWART, W. S.—Agents.

No. 195. J. DINGWALL, Suspender and Pursuer.—*Cockburn*—*Maconochie*.  
Rev. G. GARDINER, Changer and Defender.—*Sir J. Connell*—*Whigham*.

*Process*—*Manse Rent*.—Held,—1.—That a conclusion for manse rent against heritors, 'conjunctly and severally,' is incompetent;—2.—That decree having been taken against one heritor for his proportion, an extract as against him alone for the whole sum is irregular, and cannot be the foundation of diligence, either for the principal sum or expenses found due by himself alone, and decree for which has been allowed to go out in the agent's name;—and,—3.—That a single heritor found liable in expenses in a litigation carried on by himself alone, has no claim of relief against the other heritors.

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Lord Cringletie.  
F.

GARDINER, clergyman of the parish of Aberdour, having had no manse for several years pending a litigation with Dingwall his principal heritor, raised an action, concluding against him and Sir Charles Forbes, the only other heritor of the parish, conjunctly and severally, for payment of £80 yearly as manse rent for that period. No appearance was made for Sir Charles, who expressed his willingness to pay his proportion of whatever sum might be held reasonable by the Court, and no decree was asked against him; but, after a good deal of litigation, decree was obtained against Dingwall, not conjunctly and severally in terms of the summons, but for his proportion, as an heritor, of the sum of £21 of manse rent. He was at the same time found liable to Gardiner in expenses, decree for which was allowed to go out in the agent's name. Dingwall paid the greater part of the sum decerned for, but refused to pay the balance, on the ground that he was liable for no more, either of the principal sum or expenses, than his proportion as an heritor. Gardiner was therefore obliged to extract the decree; and in order to obtain an extract, his agent addressed a letter to the extractor, passing from his conclusions against Sir Charles Forbes, as to whom no decree had been pronounced; and on this an extract was granted as against Dingwall alone, in Gardiner's name as to the principal sum, and in that of his agents' as to the expenses. Gardiner and his agents then charged Dingwall for the balance remaining unpaid, whereupon he brought a suspension, on the ground that the extract on which the charge proceeded was irregularly obtained against him

alone, and that he was not liable for more than his proportion, either of the principal sum or expenses; and he also raised an ordinary action, concluding that Gardiner should take out an extract against Forbes, and assign it to him for his relief; or, failing this, that Gardiner should repeat such part of the sums already paid as exceeded Dingwall's proportion, as an heritor, of the sums decreed for. The Lord Ordinary having suspended the letters, and in the ordinary action found that Gardiner must obtain an extract in terms of the conclusions of the summons, he presented a petition; and the Court, while they adhered in the suspension, recalled the finding in the ordinary action, and remitted to supersede it, that Gardiner might take measures to obtain from Sir Charles Forbes his proportion of the manse rent awarded.

The Court were of opinion, that the conclusion in Gardiner's summons for manse rent against the heritors, conjunctly and severally, was quite unwarranted, as each heritor could only be liable in his proportion, and that the extract against Dingwall alone for the whole amount, when decree had only been given for his proportion, was irregularly obtained, and could not be the foundation of diligence. Their Lordships also held, in reference to the expenses, that Dingwall was alone liable in the whole amount; but that, as the warrant for the charge for expenses was the same extract thus irregularly obtained, the letters had been properly suspended as to them also. In regard to the ordinary action, they held that Gardiner was bound to repeat whatever Dingwall had paid beyond his proportion of the manse rent; but that it was impossible to ordain him to take out an extract in terms of the conclusions of the libel, which were not well founded in law, or against Forbes for his proportion, while no decree had been pronounced against him.

J. THOMSON, W. S.—INGLIS and WEIR, W. S.—Agents.

J. FAIT, Pursuer.—*Greenshields—More—Bruce.*

HON. MRS. MAITLAND, Defender.—*Sal.-Gen. Hope—Dean of F. Cranstown—Anderson.*

No. 196.

*Fier and Liferenter.*—Held that the fier of an estate, whose right of possession was excluded during the life of the liferenter, and which was bestowed on trustees, had no title to cut the growing timber.

THE late Dalhousie Watherstone, Esq. who was proprietor of the estate of Manderstone, and was married to the defender, executed a deed of settlement, by which, 'for certain causes and considerations hereunto moving, and for the great love, favour, and affection which I have and bear to Mrs. Jean Walker, my

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Lords Alloway  
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H.

' well-beloved spouse, have given, granted, and disposed, as I  
 ' hereby, with and under the provisions, conditions, burdens, re-  
 ' servations, and others after mentioned, give, grant, alienate, and  
 ' dispose' my whole estates ' to and in favour of myself and the  
 ' heirs-male to be procreated of the marriage between me and the  
 ' said Mrs. Jean Walker; whom failing, the heirs-male lawfully  
 ' to be procreated of my body in any subsequent marriage, and  
 ' the heirs and assignees of the said heirs-male whomsoever;'  
 whom failing, first, the heirs-female of his present marriage,—  
 second, the heirs-female of any subsequent marriage;—third, the  
 heirs-male of his elder brother;—fourth, the heirs-male of his second  
 brother;—fifth, the heirs-male of his eldest sister, Christian  
 Watherstone, wife of Mr. Landels;—sixth, the heirs-male of his  
 youngest sister, Elizabeth Watherstone, spouse of William Tait,  
 Esq. of Pirn;—whom failing, a series of other heirs. He then re-  
 served a liferent right in favour of the defender, subject to be li-  
 mited, if there happened to be children of the marriage; but, ' in  
 ' the event of there being no child or children procreated be-  
 ' tween us, and existing at the time of my decease, or dying un-  
 ' married, the said total liferent and possession of the house, gar-  
 ' den, and grounds about Manderstone, are hereby reserved to  
 ' the said Mrs. Jean Walker, and shall subsist during all the  
 ' days of her life; but always with and under the exception of  
 ' the several sums, annuities, legacies, and others hereby provided  
 ' to my lawful children (if any be,) friends, relations, and others  
 ' by this present settlement, which shall not be anyways bur-  
 ' dened or affected by the foresaid liferent, or the succession con-  
 ' ceived in favour of my several heir-substitutes before men-  
 ' tioned; and also with and under this exception and condition,  
 ' that failing of lawful heirs of my body to succeed to me, these  
 ' presents are burdened with the payment of a clear free yearly  
 ' annuity of £200 sterling to the next in succession, (whether  
 ' male or female,) by virtue of these presents, from and after my  
 ' decease, and failure of my lawful heirs, and last of these events,  
 ' and that at two terms in the year, &c. until the succession to  
 ' my estate opens to the said next heir, which at no rate shall  
 ' take place till the decease of my said spouse; and which annuity,  
 ' in the mean time, shall not be subject to her liferent.' It was  
 then provided, that ' in the event of the decease of me and the  
 ' said Mrs. Jean Walker, and the other heirs-substitutes before  
 ' mentioned, and that the succession shall, by virtue of these pre-  
 ' sents, fall to the heir male or female of my brothers and sisters,  
 ' or either of them, before the said heir arrives at the age of  
 ' twenty-one years complete, it is hereby provided and declared,

‘ that the said heir provided by these presents to the succession shall not be entitled to enter to the possession and enjoyment of the estate, real and personal, hereby conveyed, until he or she has arrived at the age of twenty-one years complete ; and, until that period, the said estate shall be under the management of the trustees after named.’ He then appointed certain persons, including the defender, ‘ to be not only the executors and administrators of this my settlement, but also trustees for my whole heirs-substitutes in their order and succession before mentioned, with full power to them, or major part, survivors or survivor of them accepting, (the said Mrs. Jean Walker, during her life, being always one, and sine quâ non,) immediately on my decease, to enter into possession of the estate, real and personal, hereby generally and specially conveyed,’—to uplift the rents and profits of the estate, and to employ them in a particular manner therein pointed out.

Mr. Watherstone and his brothers died without leaving issue ; and his eldest sister, although still alive, had arrived at an age when she was considered past child-bearing, and had hitherto had no children. The pursuer was the eldest son of the other sister, and the succession therefore belonged to him, on the supposition that the eldest sister should have no issue. As there was no direct conveyance to the trustees, (who had forthwith entered into possession,) it was found necessary, in order to the removing of tenants and letting of leases, that titles should be made up in favour of the pursuer, who was then a minor ; and accordingly he was served heir of provision, and was duly infeft under a charter of resignation from the Crown, in virtue of which he was subsequently enrolled as a freeholder. At the distance of several years, and when the defender had married the Honourable Mr. Maitland, a dispute occurred between her and the pursuer as to his right to cut the timber on the estate. This had hitherto been done, when necessary, by the trustees ; but the defender resisted any attempt on the part of the pursuer to do so, and, in her character of liferentrix and trustee, presented a bill of suspension and interdict, which was passed. The pursuer then raised an action of declarator, to have it found that he had the only good and undoubted right to the estate, subject to the burden of the defender’s liferent, and the other provisions of the deed ; and that he had right to cut down such growing timber as should not interfere with the shelter or amenity of the place, or injure the defender’s right of liferent. In defence against this action, and in support of her suspension, the defender contended, 1. That the pursuer had no proper right of fee, because it was impossible, until the

death of the eldest sister of Mr. Watherstone, to know whether he was the next heir in succession, or not; and, 2. That at all events he was a mere nominal fiar, and could only take the estate under the limitations and restrictions of the title;—that it was expressly provided that he should in no case have right to possession until after her death;—and that the management and possession of the estate, had been bestowed upon trustees, who had accordingly taken possession, and had, in the exercise of their powers, caused the woods to be thinned when necessary, and had, in obedience to the terms of the deed, appropriated the produce to the purposes there provided. To this it was answered, 1. That the fee was *ex necessitate juris* in the pursuer, because there was no other person in existence who could take the fee;—2. That accordingly titles had been made up in his person in that character; and as no attempt had been made to set them aside, he must therefore be regarded as the fiar, subject to the burden of the defender's liferent;—and, 3. That such being the case, he was entitled to cut the wood, under the qualification specified in his libel.

Lord Alloway, ‘in respect of the case of *Dickson v. Dickson*, decided by this Court upon the 24th of January 1823, ‘found that Mr. Tait, as the fiar, is entitled to cut wood on the ‘property in question, under this limitation, that in doing so he ‘shall not interfere with the amenity or shelter of the estate; but ‘that he has no right to cut any wood, without first giving notice ‘of his intention to the liferentrix, that she may judge whether ‘such an operation may affect the shelter or amenity of the property, and her comfort and enjoyment of the estate, and that ‘she may take such measures as may appear to her to be necessary for preventing the same, in case she shall conceive such an ‘operation to be prejudicial to her interest;—that the liferentrix ‘is entitled to cut such coppice-wood as has been in the use of ‘being felled, and also such growing timber as shall be required ‘for the use of the estate, either for buildings or for fences, or ‘for the other purposes of the estate; but that she is not entitled ‘to cut any of the grown timber, without giving previous information to the fiar, that he may take such measures as he may ‘think necessary, in case he thinks the operation prejudicial to ‘his interest; and, under these conditions and declarations in the ‘suspension, suspends the letters, and restricts the interdict ‘to the effect above stated, and decerns; and, in the declarator, decerns and declares accordingly.’—The defender having reclaimed against this interlocutor, Lord Eldin, ‘in respect ‘of the limitation of the right of the charger and pursuer Mr.

'Tait by the settlement of Mr. Watherstone, altered the interlocutor complained of, and in the suspension and interdict suspended the letters simpliciter; found that Mr. Tait, during the lifetime of the representer Mrs. Maitland, is not entitled to cut down timber on the estate of Manderstone, and interdicted, prohibited, and discharged him from so doing; and, in the declarator, assolizied the defender from the conclusions of the libel, and decerned.'—To this interlocutor the Court adhered, and thereafter refused a petition without answers.

**LORD BALGRAY.**—If the pursuer could show that he had an unlimited fee in the estate, then Lord Alloway's interlocutor would be right; but it is perfectly clear from the whole terms of the deed, that the grantor meant that, during the existence of the liferenter, the heir should not interfere in any respect.

**LORD CRAIGIE.**—I have some doubts as to this interlocutor; but so far I concur in it, that the title is here of a limited nature. I do not see, however, that the prohibition as to the period of the heir's entry can make the right of the liferenter broader than it otherwise would be. She herself has no right to cut the woods; and if she were attempting to do so, the fiar would be entitled to interfere, and there can be no doubt that he might name a factor to protect his interest. Perhaps, however, this ought to be done by the Court, seeing that the produce of the thinnings is to be laid aside for behoof of the heirs.

**LORD GILLIES.**—I agree with Lord Balgray. The nature of the title excludes the application of the ordinary rule. The pursuer is not the heir of Mr. Watherstone. He takes in virtue of the title on which he founds; but that title expressly says that the succession shall not open till the death of the liferenter, and it is not alleged that she is using her right improperly. The right of cutting the trees is left to the trustees, as a part of their duties as managers for behoof of the heirs.

**LORD PRESIDENT.**—I am of the same opinion, and I cannot hold, that because the elder sister of Mr. Watherstone is said to be past child-bearing, that we must lay her aside as if she were dead. Without, however, entering on this point, it is undoubted that the full management is vested in the trustees, and that the pursuer is excluded till the death of the liferenter.

**LORD BALGRAY.**—If the trustees neglect their duty, the pursuer may interfere; but that does not appear to be the case.

In this opinion the Lords President and Gillies agreed.

*Purser's Authorities.*—2. Stair, 3. 43; Rose, March 10. 1784, (14955); Mollie, Dec. 13. 1811, (F. C.); L. Mountstewart, Nov. 13. 1707, (14903); M'Kinnon, June 16. 1756, (6567); Dickson, Jan. 24. 1823, (ante, Vol. II. No. 144.)

**GIBSON and OLIPHANT, W. S.—A. SWINTON, W. S.—Agents.**

No. 197.

J. MUIR and Others, Suspenders.—*Cullen.*J. SCOTT, Charger.—*Fullerton—J. Henderson jun.*

*Cautioner.*—Held that cautioners for payment of composition-bills are not relieved by a sequestration being awarded against the principal debtor on one of these bills.

Dec. 2. 1825.

1st Division.  
Lords Alloway  
and Eldin.  
H.

GEORGE CARSWELL, who carried on business in Paisley under the firm of Walter and George Carswell, and of Robert Carswell and Company, suspended payments in 1821, and called a meeting of his creditors. It was there agreed that he should pay 15s. per pound by seven instalments,—for the first six of which he was to grant his own bills, but for the seventh, which was 2s. per pound at 22 months, he was to find security. Some of the creditors dispensed with that security; but, with regard to the others, it was arranged that a bond should be granted to Scott, for their behoof, by Muir and others,—each to a limited amount. Accordingly, a bond was granted, which, after narrating the terms of the agreement, proceeds thus:—‘ And the said George Carswell further offered to find security for the payment of the said last instalment of 2s. in the pound, payable at the said period of 22 months from the said 20th day of May last; which offer of composition having now been accepted by the said creditors under the declaration after mentioned, and various of the creditors having agreed to dispense with security for the said last instalment upon the debts due to them respectively,’ &c.; ‘ and the said George Carswell having granted bills for the said composition, payable as aforesaid, or having given other vouchers for the same, and the said George Carswell being now called upon to find security for the payment of the said last instalment to all the creditors who have not subscribed the said deed of agreement relinquishing security therefor; and we having agreed to become bound respectively, to the amount of the several sums after mentioned, for payment of the said last instalment;’ therefore the cautioners, each to a limited amount, ‘ do hereby bind and oblige ourselves respectively, and our respective heirs, &c. that the said instalment of 2s. in the pound on the whole debts contracted by the said George Carswell &c., shall be duly paid upon the 22d of April 1823, with interest thereof from that date until payment; and in case the said instalment shall not be so paid upon the said day, we do hereby bind and oblige ourselves respectively, &c., to make payment to John Scott &c. of the several sums after mentioned.’ It was then declared, that it is the express understanding that ‘ we are to



‘ fulfil the obligations now come under by us, without receiving  
 ‘ any payment, security, or relief from the said estate, funds, or  
 ‘ effects, until the sum of 13s. in the pound has been paid to the  
 ‘ whole creditors of the said George Carswell.’ In consequence  
 of the composition-bills granted by Carswell, and the security  
 found for the last instalment, the creditors agreed, on payment of  
 the composition, to discharge him of all the debts which were due  
 to them. Carswell retired the bills for the first two instalments,  
 but he was obliged to solicit indulgence as to the third; and  
 when the fourth instalment became due, he was unable to pay it;  
 and diligence being done on the composition-bills, he was ren-  
 dered bankrupt by incarceration. A meeting of his creditors was  
 thereafter held, at which it was resolved to apply for a seques-  
 tration; and accordingly this was awarded in August 1822, on  
 the petition of one of the creditors who held a composition-bill;  
 and he, together with the other creditors, ranked on the estate  
 to the extent of the composition due to them. A charge having  
 been thereafter given to the cautioners for the last instalment,  
 they brought a suspension on various grounds; but particularly,  
 that in entering into their obligation, they acted on the under-  
 standing that Carswell was to have the free administration of  
 his estate, whereas by the sequestration he had been deprived of  
 the command of his property, so that the whole arrangement  
 was disturbed, the composition-contract put an end to, and  
 the cautionary obligation thereby extinguished. In support of  
 this plea they contended, that as they stipulated for a sys-  
 tem whereby the management was confided to the debtor him-  
 self, and which was in many respects highly advantageous, a  
 complete and radical alteration had been made in their risk as  
 cautioners by the fund of relief being taken away by means of  
 the sequestration, the object of which is not so much prudential  
 management, as instant division and distribution. To this it  
 was answered, that there was no condition in the agreement or  
 he bond that diligence should not proceed on the composition-  
 bills; but that, on the contrary, the circumstance of granting  
 these bills necessarily implied that they were to be made the found-  
 ation of diligence, if they were not paid when they fell due; and  
 as a sequestration is just a congeries of all the diligences recog-  
 nised in the law, it was perfectly competent, and could not relieve  
 the cautioners from their obligation. Lord Alloway, ‘ in respect  
 ‘ of the decision in the case of Freeland and Company against  
 ‘ Finlayson and others; 11th June 1823,’ found the letters order-  
 ly proceeded; but Lord Eldon, after stating that he had ‘ paid  
 ‘ particular attention to the argument of the parties upon the de-

'cision in the case of Freeland and Company against Finlayson and others, 11th June 1823,' altered the interlocutor, and suspended the letters simpliciter. The Court, however, unanimously altered his Lordship's interlocutor, and found the letters orderly proceeded.

LORD HERMAND.—Freeland's case is precisely the same with this, and I think it was well decided.

LORD CRAIGIE.—The Judges in the Second Division were unanimous in pronouncing judgment in that case, and I think it must regulate the decision of the present one.

LORD PRESIDENT.—What is the meaning of granting bills, if it be not for diligence to proceed upon them? And if so, then a sequestration is nothing but diligence.

The other Judges concurred without making any observations.

*Charger's Authorities.*—2. Bell, 598; Freeland and Co. June 11, 1823, (ante, Vol. II. No. 368.)

W. ALEXANDER, W. S.—A. NAYN,—Agents.

No. 198. MRS. M. B. M'NEILL or JOLLY, Advocate.—*Moncrieff—Rutherford.*  
M. M'GREGOR, Respondent.—*Dean of F. Cranston—Fullerton.*

*Marriage.*—Circumstances in which it was held that a marriage in facie; ecclesie could not be affected by the conduct of the man being inconsistent with the idea of a valid marriage having been constituted, and that he could not be barred personal exceptions from maintaining its validity.

Dec. 2. 1825.  
1st Division.  
Bill-Chamber.  
Lord Alloway.  
8.

M'GREGOR, a journeyman printer in Edinburgh, raised an action of declarator of marriage, before the Commissaries, against Mary Black M'Neill, the natural daughter of the late Dr. James M'Neill of Stevenston, in which he alleged that an irregular marriage had been celebrated between them in spring 1816 at Holytown, and there consummated; and that, in the month of May of the same year, the marriage ceremony was celebrated, in facie ecclesie, by the Rev. Joseph Robertson, minister of the chapel in Leith wynd, Edinburgh. In defence, she denied the alleged marriage at Holytown, and stated that she had been compelled, by means of threats of personal injury to herself and to a Mr. Jolly, to whom she was then engaged to be married, to go to the house of Robertson, and there to submit to the ceremony taking place. A proof was allowed by the Commissaries, from which the material circumstances appeared to be shown:—M'Gregor was about 50 years of age, had been previously married

to the stepdaughter of a woman who was the nurse of Miss M'Neill, and had got acquainted with her at an early period of life, and also with Dr. M'Neill. This gentleman had no lawful children; and in May 1816 he executed certain deeds, by which he conveyed to his daughter, after his death, his whole property, which was of considerable value. M'Gregor, who was on terms of intimacy with Dr. M'Neill, became acquainted with this circumstance, and he was also aware that Mr. Jolly was paying his addresses to Miss M'Neill. Soon after the execution of these deeds, and early in May 1816, M'Gregor accompanied Dr. and Miss M'Neill on a journey to his estate of Stevenston, in the course of which they were obliged to stay at an inn at Holytown. There happened to be only two bed-rooms, one of which was a double one, and the other a single one. Dr. M'Neill took possession of the single one, and, after some reluctance, Miss M'Neill agreed to sleep in one of the beds of the double-bedded room, while M'Gregor was to be in the other. There was, however, no evidence that a marriage had taken place, nor of any sexual intercourse having occurred between them. On returning to Edinburgh, and on the 23d of the same month, (at which time they were both residing with Dr. M'Neill,) M'Gregor, according to her statement, induced her to go out with him, in consequence of having represented that it was necessary to call on a law-agent to get something done to the deeds, which were now in his custody; but that, instead of going thither, he carried her towards the house of Joseph Robertson, minister of the chapel in Leith wynd, and threatened to destroy the deeds, and to do personal injury both to herself and Mr. Jolly, unless she immediately married him. Of these threats, however, there was no evidence, and it appeared that she was at this time 26 years of age;—that the parties went, between nine and ten o'clock at night, into the presence of Robertson, where the marriage ceremony was celebrated, without any other witnesses than the wife and daughter of the clergyman;—and that although Miss M'Neill made no answer, yet, when the usual question was put to her, she bowed, and showed no reluctance. No banns had been proclaimed; but M'Gregor had obtained from the session-clerk a certificate of this having been done, which he exhibited to Robertson, and which, it appeared, was at this time commonly issued, although no banns had been proclaimed. After the ceremony had been accomplished, marriage lines were delivered to her, and they returned to the house of Dr. M'Neill. It was, however, positively denied by Miss M'Neill that M'Gregor had enjoyed the privileges of a husband; and so far as there was any evidence on the point, it rather appeared that he had slept in a

separate apartment. No public announcement was made of the marriage; but one or two witnesses; and particularly a person of the name of White, deposed that soon thereafter they had addressed her in presence of her father and of M'Gregor, and had drank to her as Mrs. M'Gregor.

On the 13th of June of the same year, Miss M'Neill was married by Dr. Robertson of South Leith to Mr. Jolly, and the marriage was attended by her father Dr. M'Neill, who gave her away, and this circumstance was publicly known in the neighbourhood. After this, they resided, during the life of Dr. M'Neill, in his house as husband and wife, and it was established that M'Gregor was in the habit of visiting them—that he addressed them as married persons—that he had repeatedly drank to their healths by the name of Mr. and Mrs. Jolly—that he sat in the same pew of a church with them—and that on one occasion he accompanied them and Dr. M'Neill to Stevenston, and that, having again staid at Holytown during the night, they slept together in one bed, while he slept in another in the same room. Of this marriage there were several children, and the validity of it was not disputed till the death of Dr. M'Neill, when his estate became vested in Miss M'Neill by virtue of the deeds which had been executed in her favour. Soon thereafter M'Gregor brought this action of declarator, but he ultimately confined his allegation of the marriage to the 23d of May, in presence of Robertson. In support of this he maintained, that as it had been celebrated in presence of a clergyman of the church of Scotland, it must be held to have been done in *facie ecclesie*, and that that fact was sufficient to establish a binding consent on the part of Miss M'Neill, or at least to throw upon her the burden of showing that her consent had been obtained by fraud or violence. To this it was answered,—1. That there was no satisfactory evidence that she was the person who had appeared in presence of Robertson, and that her own admissions could not be received as proof against her in a question as to her own status, more especially where that of both Mr. Jolly and her children was involved;—2. That the marriage could not be considered as having been celebrated in *facie ecclesie*, because no banns had been proclaimed; and that although Robertson was at that time a licensed clergyman, yet he had soon thereafter been banished Scotland for life, in consequence of celebrating clandestine marriages, and forging certificates of marriage;—3. That the whole circumstances, both prior and posterior to the date of the alleged marriage, must be taken into consideration in judging whether or not there had been a valid matrimonial consent interchanged; and that it was proved by these cir-

circumstances, that neither M'Gregor nor Miss M'Neill understood that such a consent had been given;—and, 4. That M'Gregor was barred *personali exceptione* from objecting to the validity of the marriage with Mr. Jolly. The Commissaries found, ' that ' the pursuer has established by sufficient evidence that a marriage was celebrated betwixt the defender and him by the ' Rev. Joseph Robertson, late minister of the chapel in Leith ' wynd, Edinburgh, in the month of May 1816;—that the defender ' has failed to establish by evidence any circumstances sufficient ' to elide the legal presumption thence arising of the matrimonial ' consent having been duly adhibited by her on that occasion,' and therefore declared them married persons. Thereafter they found, ' that no circumstances have been attempted to be proved ' on the part of the defender, from which to infer intimidation, as ' averred by her;—that the inference of the defender's matrimonial ' consent, arising from the marriage ceremony at Robertson's, is ' strengthened by the defender's admission that the pursuer accompanied her back from Robertson's to her father's house on ' the same evening, and that a presumption thence arises of sexual intercourse having followed betwixt the parties, which is ' further confirmed by what passed at White's, the lapidary, sometime thereafter;—that the inference of the defender's matrimonial ' consent is not contradicted by any part of the pursuer's conduct ' immediately following the marriage ceremony; and that although ' his conduct at a subsequent period may import his willingness ' to relinquish his legal claims to the defender as his wife, such ' conduct cannot destroy the legal effect of the evidence adduced ' to establish the validity of the previous union of the parties,' and therefore adhered to their interlocutor. A bill of advocacy having been presented, the Court remitted to the Commissaries with instructions to allow a further proof, particularly as to the circumstances under which the marriage with Mr. Jolly took place; and the Commissaries having thereafter adhered to their former interlocutor, and another bill of advocacy having been presented, the Court, on the report of the Lord Ordinary, refused it, and thereafter refused a reclaiming petition without answers.

**LORD HERMAND.**—The main question which we have to decide is one of fact, and it appears to me that all the circumstances are in favour of the defence, except the ceremony at Robertson's; and I am disposed to hold, on taking a complex view of the evidence, and advertg to the conduct of M'Gregor himself, that there was no deliberate matrimonial consent. Indeed his conduct is utterly incomprehensible, except on such a supposition. There was no procla-

mation of banns, and therefore it cannot be called a regular marriage, but merely a marriage by acknowledgment. This is no doubt binding; but then we are entitled to look at all the circumstances, both prior and posterior, to ascertain whether there has been such a consent as the law requires; and I am of opinion that there has not.

**LORD PRESIDENT.**—I wish extremely that I could bring my mind to the same opinion; but I cannot. The marriage with Jolly is unquestionably good, if it be not vitiated by the prior one with M'Gregor. His allegation is, that he was married some weeks previously by Robertson, who was at this time a regular licensed clergyman, and the witnesses were his wife and daughter. The identity of Miss M'Neill is made out by her own admission. Both marriages were in facie ecclesiæ; but the defence is put upon the allegation, that the one with M'Gregor was accomplished by means of terror. No proof, however, has been produced either of deceit, threats, or force; and it is established that she was then 26 years of age,—that she walked along the public streets of Edinburgh on an evening in the month of May, and it is not pretended that she could not have called out for assistance. Besides, when she came into the presence of Robertson, she might have thrown herself on the protection of him and his family; but she did no such thing. On the contrary, she walked home with M'Gregor to her father's house; and although there is no direct evidence of consummation, yet it may be safely presumed that it took place, as he undoubtedly slept in the same house with her, and the occurrence at Holytown shows that they were on terms of very great familiarity. No doubt, both parties seem afterwards to have repented, but this will not do; and, of that, the case of M'Adam affords sufficient evidence, where the repentance was announced almost immediately, and in the most tremendous manner. In that case the consent was only before servants, but here it was in the presence of a clergyman; and although this is not probatio probata of consent, and may be redargued by circumstances, yet no case has occurred of the marriage of a person above minority having been set aside, where it has taken place before a clergyman. The conduct of M'Gregor has certainly been most extraordinary and disgusting, but that cannot affect the validity of a marriage duly established.

**LORD BALGRAY.**—When the case was formerly before us, I was in favour of the defence, because it appeared to me at that time that it was utterly impossible that any human being could have acted as M'Gregor has done, on the supposition of there having been a marriage with him. But, on reflection, I am afraid that there is no other alternative than to give effect to that marriage.

**LORD CRAIGIE.**—I had never any difficulty on this case. The question is simply, whether there is evidence of a legal marriage? The

celebration in presence of a clergyman is sufficient per se to establish a valid consent; but no doubt it may be redargued. The main object of the defence seems to be, to establish a personal objection against M'Gregor; but this is inadmissible in a question of status.

**LORD GILLIES.**—I am sorry to say that I am of the same opinion. It is impossible to get over the marriage in facie ecclesie. The only innocent parties are Jolly and his children, and they have been brought into their present unfortunate condition by the acts of this person M'Gregor.

*Advocate's Authorities.*—1. Ersk. 6. 10. and 11; Cameron, June 29. 1756, (16767); Allan, Aug. 11. 1778, (not rep.); M'Innes, Dec. 30. 1781, (12683); Taylor, Feb. 12. 1796, (12687); M'Gregor, Nov. 28. 1801, (12697); Napier, Nov. 1800, (see Dalrymple v. Dalrymple.)

**J. SMYTH, W. G.—J. MILLER, W. G.—Agents.**

**J. DREW, Complainer.—Moncreiff—Henderson.**

No. 199.

**J. PATERSON and Others, Respondents.—Shaw.**

*Bankrupt—Sequestration—Title to Patrimony.—Circumstances in which it was held.*—

1.—That before paying any dividends out of a sequestrated estate, the trustee was bound to inquire into the nature of an agreement entered into by some of the creditors, and one of the commissioners, to purchase the heritable property of the bankrupt, and the debts due by him;—and, 2.—That an objection to the title of the complainer, that it was founded on a bill which was acquired by him after it was dishonoured, and that he was therefore liable to objections affecting it as in the hands of the drawer, was no bar to such inquiry.

DREW, as a creditor on the sequestrated estate of M'Luckie, presented a petition and complaint, stating that in 1808 part of the heritable property of the bankrupt had been exposed to sale, and that Paterson and others who were creditors on the estate, and one of whom was a commissioner, had entered into a joint agreement to purchase it, together with the debts of several of the other creditors, for purposes which appeared suspicious, and in which the bankrupt was concerned;—that a motion had been made at a meeting that an investigation should be made into this transaction before any dividends should be paid; but that this had been opposed by Paterson and others, and that a resolution had been formed that the dividends should be forthwith paid,—and therefore praying that inquiry should be made before further procedure. To this it was answered, 1. That Drew had no title to complain; 2. That the transaction was perfectly fair, because the respondents had entered into a joint speculation to purchase the property in open market;—that they had published the

Dec. 2. 1825.

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Lord Medwyn.  
H.

agreement by recording it in the Sheriff Court books of Lanarkshire, and announcing it in the sederunt-book of the sequestration;—and that the circumstance of one of the parties having been a commissioner, and the allegation of profit having been made, were not relevant; and, 3. That the question as to the dividends was *res judicata*, by the trustee having many years ago made up a scheme of division, and allocated dividends to the respective creditors, and by their right to these dividends having been ascertained and fixed by a decree in *foro* pronounced in a multiple-poining. In reference to the objection to the title, it was stated that the bill on which Drew founded his right as a creditor, was an acceptance by the bankrupt in favour of William Hamilton, dated 10th September 1805;—that it was proved by a letter of Hamilton that this was an accommodation to him, so that he was the real obligant;—that the bill had been indorsed by Hamilton to a Dr. Monteith, by him to a Mr. Graham, and by him to Mr. Alston;—that it was then protested, and diligence raised on it;—that it lay in that state till March 1811, when it appeared to have been retired by Dr. Monteith;—that no assignment, however, either of the bill or diligence, had been granted to him; and that, notwithstanding, he had assigned it to one Adam, and, after certain intervening assignments, it had come into the hands of Drew. It was therefore contended that Drew's title was defective; 1. Because a bill, after being protested, and made the subject of diligence, cannot be transferred, except subject to all the objections to which it was originally exposed; and that as it was proved that the debt was truly due by Hamilton the drawer, to whom Drew necessarily traced his right, he had no title to claim on it; 2. Because, as there was no evidence by whom the bill had been retired, the presumption of law was, that this had been done by the proper obligant Hamilton, and therefore it was extinguished; and, 3. Because there was no evidence of its transmission by Alston to Graham, nor by Graham to Monteith. The Lord Ordinary, after finding that the allegations as to the nature of the agreement were unsupported, and that it had been publicly announced, found, 'that if there was any thing fraudulent in the purchase of the heritable property, it ought to have been brought forward in a challenge of the sale; and that the allegation that the respondents have obtained full payment of their debts is not relevant to entitle the petitioner to object to the trustee paying to the respondents the dividend declared so long ago as the year 1807, unless it be asserted that their debts have been paid out of the bankrupt estate under the management of the trustee;—



'that no such allegation is made;—but, on the contrary, if they had been paid, that the payment has been made in consequence of the speculation as to purchasing the bankrupt's property turning out successful, with which, however, the other creditors have no concern;' and therefore dismissed the petition and complaint.' But the Court altered, and 'appointed the trustee upon the sequestrated estate to inquire into the agreement set forth in the pleadings, and that in terms of the motion' founded on, and thereafter refused a petition without answers.

LORD HERMAND thought the objection to the title well founded, but the other Judges disregarded it; and, in pronouncing the judgment on the merits, they were chiefly influenced by the circumstance of one of the parties to the agreement having been, at the date of the purchase, a commissioner on the estate.

*Respondents' Authorities.*—(1.)—Bayley, 118; Chitty, 127; 3. T. R. 790; 1. Campbell, 19; Thomson, 338; Ferguson, Nov. 29. 1793, (14088); Russel, Jan. 27. 1824, (ante, Vol. III. No. 615.)

A. PATERSON, — CAMPBELL and BURNSIDE, W. S. — Agents.

A. SCOTT, Advocate. — *Skene* — *Graham Bell*.  
T. FISHER and Others, Respondents. — *Baird*.

No. 200.

*Execution.*—Arrestments having been executed by a Sheriff-officer in the hands of Sir J. H. M. of Springkell, by leaving a copy with a servant, 'within his dwelling-house,' but without stating at Springkell, and this being his only house within the county, held not a good objection to their validity, that the executions did not specify the name of the dwelling-house.

IN a competition of arrestments in a multiplepoinding before the Sheriff of Dumfries-shire, Scott, a posterior arrester, objected to the arrestments founded on by Fisher and others, that the executions did not specify the dwelling-house of Sir John Heron Maxwell of Springkell, the arrestee. The executions bore, that 'I Thomas Hill, Sheriff-officer, by virtue of a libelled summons from the Sheriff-depute of Dumfries-shire, and his substitute; dated, &c., containing a warrant to arrest, &c., lawfully fenced and arrested in the hands, custody, and keeping of Sir John Heron Maxwell of Springkell, Baronet, all and sundry goods, gear, &c., by leaving for the said Sir John Heron Maxwell, with his servant maid, within his dwelling-house, to be given him, because I could not apprehend himself personally, a copy of arrestment to the effect aforesaid,' &c. It was admitted that Sir John Maxwell had only one dwelling-house in the county of Dumfries, the name of which was the same with his own design-

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2d Division.  
Lord Mackenzie.  
B.

nation, viz. Springkell, and that this was his principal place of residence; but that in the stewartry of Kirkeudbright he had another dwelling-house called Kerroughtree, situated on a property belonging to him in right of his wife, where he resided occasionally. By Scott it was contended, that the omission to specify the name of the place where the arrestments had been used was fatal to their validity, and could not be supplied by inference or presumption, in respect of the strictness which the law required in regard to executions. On the other hand, it was maintained for Fisher, &c., that the circumstances of the name of Sir John Maxwell's house being the same with his designation,—of his having only one place of residence within the county of Dumfries,—and of the arrestments having been executed in virtue of a warrant of the Sheriff of that county, sufficiently pointed out the place of execution; and in support of their argument they founded chiefly on the case of Castlemains. The Sheriff having overruled the objection, and sustained the executions of arrestment, Scott brought an advocacy, in which the Lord Ordinary found 'the arrestments of the respondents objectionable in respect of the want of due execution,' and preferred Scott to the fund in medio.

In a note his Lordship observed:—'The case of Castlemains appears to the Lord Ordinary to be of a very uncertain nature. If it was, which seems altogether doubtful, such as is alleged by the respondents, it seems to have been a case of indulgence given by the Court, in consideration of a loose practice that had prevailed to some extent at that time. But the general style of executions shows no such looseness now, or to have existed recently, and it is irreconcilable to any principle. The execution in question not only does not state explicitly or expressly the place of arrestment, &c., but it leaves this to uncertain conjecture from facts not appearing on the face of the execution at all. It is said, the executions in this case show that Sir John Heron Maxwell was of 'Springkell;' but does that expression prove that his house is called by the same name? Plainly not. An estate may have no house on it, or a house with a separate and different name. The person called 'of that estate' may have another house at which he dwells. Indeed he may only be far of the estate, and the house thereon may be in the hands of a liferenter, or he may have let the house to a tenant. It is plain there would be no convicting the executions in question of falsehood, though Sir John Heron Maxwell had dwelt in a house at the opposite end of Scotland. But that is just in other words saying that the execution does not state the arrestment to have taken place at the house of Springkell.'

On a reclaiming petition, however, the Court altered the interlocutor, repelled the objection to the execution, and remitted to the Lord Ordinary to hear parties on certain other objections taken to the validity of the arrestments.

**LORD GLENHEK.**—There is no special formula for executions of arrestments; but it is necessary that the dwelling-house where the arrestment is used should be distinctly pointed out. This, however, is sufficiently done, if it can be directly inferred from the execution itself, which is the case here; for the officer being set forth as a Dumfries-shire Sheriff officer, could do nothing as such out of Dumfries-shire; and the necessary inference is, that he left the copy of arrestment at Sir John's house in that county. If Sir John had had two houses in Dumfries-shire, we might be obliged to resort to the circumstance of the name of the house being the same with his designation; but it is not necessary to do so here, as Sir John is not alleged to have another dwelling in Dumfries-shire. The cases of Castlemains and Montgomery are much narrower than this, as there the arrestments were executed by messengers at arms, so that there was no presumption of the kind that exists here. The inference was sufficiently plain in those, and in the case of Wight; but the present one is still stronger.

**LORD HENDERSON.**—An execution is evidence only of what appears *ex facie* of it; and if inferences were allowed, it would open a door to dangerous consequences. I agree with the Lord Ordinary that the execution does not state the arrestment to have taken place at the house of Springkell.

**LORD PITMILLY.**—I have had considerable difficulty in forming an opinion on this case. There is a great deal in the argument for the advocates, and in the Lord Ordinary's observations; but as the case of Castlemains has been followed in practice, and is confirmed by that of Wight, it would be improper to overturn it.

**LORD ALLOWAY.**—Having been Ordinary in the case of Wight, I had occasion to consider this question in the Outer House. I conceive that the ancient strictness regarding executions arose from the dreadful effects of escheats on horning, which rendered it proper to put the strictest possible construction on executions. But, in applying the act of Parliament 1540 to the present practice, it does not appear to imply any absolute necessity for specially designing the mansion-house. It is sufficient if the parties can, from the execution, fairly understand where the act took place; and, from the execution itself in this case, it is perfectly obvious that the arrestments must have been executed at the only house Sir John Maxwell possessed in Dumfries-shire. The case of Castlemains and that of Wight, which was, like this, a case of competition, are exactly in point; only the present is stronger.

**LORD JUSTICE-CLERK.**—It is undoubtedly necessary that there must appear on the face of the execution fair information as to where the arrestment took place. The rule, however, is clearly drawn in the case of Castle mains, (which there is no reason to suppose inaccurately reported,) that where the designation and the dwelling-house are the same, the description is sufficient without naming the house. That case was a ratification of previous practice, and the same practice has continued on the faith of it, as appears from Thomson's Treatise in 1790 on the 'Office of a Messenger;' and there is no later decision throwing any doubt on that of Castle mains. The case of Adam, referred to by Scott, is not in point. The designation, 'burgess of Ayr,' conveys no certainty as to the dwelling-house, residence not being a necessary qualification for a burgess. A man may be a freeman of London, and live at Orkney. On the other hand, the late case of Wight, where the arrestee was described as 'farmer at Peaston' in East Lothian, and the name of the house was not mentioned, settles the question, being much weaker than the present, as many farmers in East Lothian possess farms at which they do not reside, although they would properly enough be designated as farmers at such places.

*Advocates' Authorities.*—Stat. 1540, c. 75; King's Advocate v. Burnet, July 1582, (3748); Johnston, Feb. 1609, (3748); Adam, July 14. 1626, (3748); Gilmann, Feb. 21. 1693, (3752); Election of Brechin, Feb. 6. 1741, (Eloches v. Burgh Royal, 15); 2. Hume, 246; 3. Stair, 3. 2. 9. &c.; 2. Ersk. 5. 55.

*Respondents' Authorities.*—Montgomery v. Fergushill, Nov. 9. 1632, (3749); Crichton of Castlemains, Feb. 8. 1684, (3750); Home, July 30. 1725, (3704); Wight, May 28. 1822, (ante, Vol. I. No. 482.)

LINNING and NIVEN, W. S.—W. MARTIN,—Agents.

No. 201.

W. CAMPBELL, Pursuer.—*Sol.-Gen. Hope—Tait.*

R. BAIRD, Defender.—*Cuninghame—Shaw.*

*Process.*—Certain interlocutors having been pronounced by an Inferior Court in an action founding on a deed of agreement, and a reduction having been brought of these interlocutors, and of the deed, and it being objected that it was incompetent to reduce interlocutors in a depending process, the Court superseded that point till the issue of the reduction of the deed.

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1st Division.

Lord Meadow-

bank.

H.

A petition was presented to the Justices of the Peace of Lanarkshire, in the name of the firm of Hugh and Robert Baird, founding on a deed of agreement executed between them and Campbell, by which the latter became bound to serve them for two years, and stating that he had deserted his service, and praying that he should be ordained to return to it, and find caution to implement his obligation, under certification of imprisonment.

After some procedure, an interlocutor was pronounced on the 5th November 1824, ordaining Campbell 'to return to his service,

‘and implement his agreement, and to find caution to that effect acted in the books of the peace, under a penalty of ten pounds; under certification, that if he fails to implement this interlocutor within three days from this date, warrant to imprison will be granted as craved.’ Campbell referred his defences to the oath of Robert Baird; and, on advising his deposition, the Justices of new decerned and ordained in terms of the interlocutor of 5th November last, under the certification therein contained, ‘and found the defender liable in expenses.’ After these had been modified, but before the interlocutors had been extracted, Campbell raised an action against Robert Baird, concluding for reduction of the interlocutors, and of the deed of agreement founded on. This action was objected to, 1. Because it was not competent to reduce interlocutors in a depending process, which was the nature of those brought under reduction, seeing that they had not been extracted; 2. Because that process had been raised in name of Hugh and Robert Baird, and the interlocutors had been pronounced in their favour, whereas this action had been raised against Robert Baird in his individual capacity; and, 3. Because, as the deed of agreement formed the foundation of the petition to the Justices of the Peace, and therefore part of that process, it could not be brought under reduction, so long as the proceedings were there in dependence. To this it was answered, 1. That it was competent, prior to 50. Geo. III. c. 112. to bring interlocutors under review by reduction, and that no prohibition was there contained against doing so in future; 2. That, in point of fact, Robert Baird was the sole partner of Hugh and Robert Baird, and therefore the action was directed against the proper party; and, 3. That the existence of the Inferior Court process could be no bar to an action of reduction of the deed of agreement. The Lord Ordinary having reported the case, chiefly in relation to the first objection, the Court remitted to his Lordship to hear parties as to the reduction of the deed, and in the meanwhile to supersede the case quoad ultra.

The Court were of opinion that if the deed were set aside, the interlocutors must necessarily fall, or at all events would be unavailing; and therefore they declined at present to pronounce any judgment as to the competency of an action of reduction of them.

*Petitioner's Authorities.*—(1.)—4. Ersk. 2. 8; Stair, 798; 4. Stair, 52. 6; 2. Kames L. Tr. 394; Boyd, Jan. 19. 1825, (ante, Vol. III. No. 317.)

*Defender's Authorities.*—(1.)—2. Bank. 676; 4. Stair, 46. 27; 4. Ersk. 2. 89; Stair, 797. 774; 4. Ersk. 2. 39; 4. Ersk. 3. 8.—(2.)—A. v. B. Feb. 26. 1741, (14560); Reid, June 11. 1814, (F. C.); Stevenson and Co. Dec. 14. 1757, (14560); 2. Bell, 619.

**D. SCALLES,—A. P. HENDERSON,—Agents.**

No. 202. LORD PROVOST OF GLASGOW and Others, Suspenders.—*Jeffray—Mentoith—Ivory.*

R. ABBEY and Others, Chargers.—*Moncrieff—Cookburn—Shaw.*

*Process—Suspension.*—Suspension an incompetent mode of complaining of the election of a Commissioner of Police, after he has been sworn into office, and acted for some time in his official capacity.

Dec. 3. 1825.

2d DIVISION.  
Bill-Chamber.  
Lord Medwyn.

B.

AT the election of a General Commissioner of Police for the fifth ward of the City of Glasgow, on the 25th April, Abbey was declared by the Board of Police to have been duly elected. A protest was then taken, that the election had truly fallen on Wilson; but, on the 5th May thereafter, Abbey was sworn into office, and continued from that period to act as a Commissioner. In October following, the Lord Provost and a minority of the other Commissioners, Wilson and certain occupiers of houses, &c. in the fifth ward, presented a bill of suspension and interdict, praying to have Abbey prohibited from acting as a Commissioner, and the majority of the Commissioners interdicted from preventing Wilson from acting in that capacity, and also from destroying or putting away the written votes and other documents in their possession, relative to the election. To this bill it was, *inter alia*, objected that a suspension was incompetent, as the election complained of had obtained its full execution and accomplishment, by Abbey having been sworn in and acted as a Commissioner. The Lord Ordinary having refused the bill, 'as inapplicable to the circumstances of the case,' and found the suspenders liable in expenses, they presented a reclaiming note, and contended, 1. That as the act complained of was of a continuous nature, a suspension was competent, as in the case of imprisonment, although the execution had commenced; and, 2. That at all events they were entitled to an interdict against destroying the documents. The Court, without hearing the charger's counsel on the first point, adhered; and no objection being made as to interdict being granted against putting away the box containing the votes, they passed the bill *quoad hoc*, reserving expenses.

**LORD JUSTICE-CLERK.**—The Court are of opinion, that Abbey having been sworn into office on the 5th May, and having acted as a Commissioner since that period, they cannot interfere by suspension. In regard, however, to the preservation of the documents, interdict may be granted; and it being thus necessary to pass the bill in part, the question as to expenses in the Bill-Chamber is consequently reserved.

CAMPBELL and MACDOWALL, — J. FARVISTON, — Agents.

Sir A. KEITH, Pursuer and Advocate, — *Forsyth—Keay—Murray.*

No. 203.

LOGIE'S HEIRS and Dr. YOUNG, Defenders and Respondents. —  
*Moncreiff—Skene—Shaw—Stewart.*

*Landlord and Tenant.*—Under an improving lease, the terms of removal in which were Whitsunday as to the grass, and the separation of the crop as to the arable land.—*Held*,—1.—That the tenant was not bound to remove at Whitsunday from arable land which had been natural pasture at the commencement of the lease, but brought in by him in the course of it.—2.—That he was bound to remove at that term from all grass, whether growing on arable or pasture land; but,—3.—That under 'grass' could not be included the crop of hay arising from seed sown with the penult crop, and yielding the first crop in the year of removal; and,—4.—That where the landlord has the stipulated quantity of grass left on the whole lands let, he cannot object to the want of a relative proportion on the particular farms into which the lands had been sublet.

Dec. 2. 1825.

2d DIVISION.  
Lord Mackenzie.  
M'K.

THE late Francis Logie obtained from the grandfather of Sir Alexander Keith, the pursuer, an improving lease of the greater part of the estate of Dunottar, for the period of thirty-eight years 'from and after Whitsunday 1783 as to the houses and grass, 'and from the separation of the crop 1783 as to the arable land;' at which period the entry to the grass and arable land respectively took place. The tenant was bound, among other stipulations, 'during the last three years of the lease, to lay down annually 100 acres in good heart, with rye-grass and clover, so as 'to leave 800 acres in sown grass at the end of the lease.' The lands thus let extended to about 1500 acres, of which 700 were pasture, and the remainder arable, 450 of which were infield at the date of the tack, and the rest outfield. A large proportion of the muir and pasture (upwards of 500 acres) was, during the lease, brought into cultivation by the tenant, and converted into arable ground. In 1820, being the year prior to the expiry of the lease, grass had been sown along with the grain on a considerable part of the land, so as to produce its first crop of hay in 1821. On the whole estate there had been considerably more than 100 acres sown annually in grass for the last three years; but it was divided into separate farms, on one of which that was sublet to Dr. Young, there was not the full proportion of the 800 acres of grass effecting to the size of his farm. At Whitsunday 1821, Sir Alexander Keith brought an action of removing, before the Sheriff of Kincardineshire, against Logie's heirs and subtenants, in which he contended that they were bound to remove at the term of Whitsunday, not only from all natural pasture and sown grass of the second year, but from all the arable land which had been natural pasture and outfield at the date of the tack in 1783,

to which they must then have entered at Whitsunday, and from all the land in hay sown in 1820, and yielding its first crop in 1821. On the other hand, the tenants contended that they were entitled to remain in possession of the whole arable land, whether in grain or hay crop, or in grass, till the separation of the crop, and were only bound to remove at Whitsunday from the natural pasture. The Sheriff found, ' That the defenders are entitled to ' occupy and possess the whole arable land until the separation of ' the crop from the ground, and that, whether under grass crop ' or grain, but must remove from yards at the same time with ' their removal from houses.' Sir Alexander Keith then brought an advocacy, which was conjoined with a previous ordinary action raised by him, concluding for damages on account of certain alleged acts of mismanagement, and particularly on account of a due proportion of grass not having been sown on Dr. Young's separate farm during the three last years, which he contended meant the years 1818, 1819, and 1820,—there being the requisite quantity, if the three last years were to be held, as to this, to be 1819, 1820, and 1821. The Lord Ordinary found, in the action of damages, ' That, under the lease in question, it was ' agreed, that during the last three years of the lease, the tenants ' should lay down annually 100 acres, &c. with rye-grass and clo- ' ver, &c. ;—that the tenant had power to implement this clause ' pro tanto, by laying down a portion of land with rye-grass and ' clover with the last or waygoing crop; and therefore, on the ' whole case, that there appears to have been no mismanagement ' of the land, nor any failure to implement the conditions of the ' lease during the continuance thereof,' and assoilzied the defend- ' ers from the conclusions of that action; and in the advocacy his Lordship found, ' That, by the lease of the estate of Dunot- ' tar, the land was let for the space of 86 years, and as many ' crops from and after Whitsunday 1788, at which time the tack- ' man's entry to the whole houses and grass is declared to com- ' mence, and to the arable ground at the separation of the crop ' 1788 from the ground: That, under the words of this clause, ' the tenant was bound to remove from the whole grass at Whit- ' sunday 1821, and was not entitled to retain possession of a por- ' tion of the said grass, as grass growing upon the arable part of ' the said farm; but that under grass is not to be included land ' sown for a crop of hay to be reaped in the year of removal.' His Lordship therefore advocated the cause, altered the Sheriff's interlocutor in so far as inconsistent with these findings, and found ' that the defenders, the heirs of Francis Logie, Esq. are ' liable in violent profits for the grass (not being hay, as above



‘explained’) retained by them and their tenants after Whitsunday 1821, and from which the pursuer and his tenants were excluded.’ Against this interlocutor Sir Alexander Keith reclaimed, but the Court unanimously adhered.

**LORD ALLOWAY.**—The difficulty in this case does not arise from principle, but from some former decisions ; and it is fortunate that this case has occurred, where the pure question of law, which is of great importance to agriculturists, may be determined on general principles. There are three points which occur in this case. 1. As to the question of damages, the case does not turn on neglect of due cultivation, according to the rules of common law, but on alleged disregard of the express stipulations of the lease ; and as the tenant has, over the whole estate, laid down more than the 300 acres of grass required of him during the last three years of his lease, he has fully implemented the condition of the tack, although each parcel into which the lands were sublet may not have a proportionate quantity effecting to its extent. 2. The landlord contends that the tenants must remove at Whitsunday from all the arable land which was pasture at the date of entry, and has been brought in during the lease, as otherwise they will have reaped more than 38 crops from that land. Now this was an improving lease, and the tenant brought in the new land for the landlord’s benefit, and under his eye ; and, in applying the words of the lease, we can only consider what was grass, and what arable, at the period of termination. This was settled in the case of *Shepherd*, which was affirmed in the House of Lords, and is not affected by the decision in the case of *Brodie and Murdoch*, where the tenant held a meadow and arable lands as separate possessions, and at distinct rents, and where the term of removal from the meadow was, by the agreement, specially fixed at Whitsunday. 3. The remaining point is, whether under ‘grass’ is included the crop arising from grass seeds sown in the year before removal. Several cases relative to this have occurred in questions between *fiar* and *liferenter*. In *Dalrymple*, in 1744, such a crop was held to be grass, and to belong to the *fiar* on the *liferenter*’s death. This decision was repeated, in 1796, in the case of *Wight and Inglis*, but solely on the authority of the previous decision ; and it was only from deference to these authorities that the First Division followed the same rule more lately in the case of the *Marquis of Tweeddale v. Sumner*, where I was Ordinary, and which I reported, as I conceived the previous judgments to have been erroneous on principle. The present case is, however, different from any of these decisions ; and in determining it, there is no necessity for running counter to them. This is a question of construction of a contract, which must depend entirely on what is to be considered

to have been the intention of parties, and as to what they meant by 'grass' and what by 'crop.' The decision of the first case between liar and liferenter proceeded on the supposition that hay was not an industrial crop, or that it was the second crop arising from the seed, the first being considered to be reaped along with the grain with which it was sown. This is a mistake. The first crop of hay from sown grass is as much an industrial crop as oats or barley; and, under the terms of this lease, it must have been understood that the tenant was not to remove till he had separated that crop from the land.

**LORD GLENLEE.**—The case of *Sumner* does not rule the present, which is a question on a contract; and it is impossible under it to hold that by grass was meant a crop of hay arising from sown grass seed, and which must be separated from the land. Such a mode of expression as to term this grass was never heard of, and cannot be held to be the meaning of the contract. The case would be different as to a second crop of hay. It is the fact of the grass seeds being sown, so as to yield a crop from seed the year of removal, which makes it a hay crop, and nothing but a hay crop. There may, however, be some room for a distinction in the case of a liferent lease. Suppose an orchard is let, and the term of removal is the separation of the crop: Here the tenant would be entitled to take the fruit, although, if it were a liferent lease, his heirs might not, on his death, be allowed to retain possession till the crop was gathered. But in this case the terms of the lease warrant the interlocutor of the Lord Ordinary.

**LORD PITMILL.**—I concur entirely with the opinions that have been delivered. The decisions presented the only difficulty; for there is none on principle. It is clear that although hay takes two years to come to perfection, so as to produce a crop, it is equally a crop with grain; and the tenant is entitled to retain the first crop from grass seeds, in the same way as any other crop. The decisions are confessedly erroneous on principle, and they certainly ought not to be pushed further than they actually go; and they only apply to cases of liferents falling by death.

**LORD JUSTICE-CLERK.**—The case of *Sumner*, brought under the notice of the Court by Lord Alloway, created some difficulty in my mind; but, on considering it since yesterday, I do not think we need here interfere with it. Undoubtedly, from grass lands, properly so called, whether on original arable land, or on that newly brought in, the tenant must remove at Whitsunday; but the hay crops arising from grass sown the year before removal are to be considered arable, and the tenant is entitled to reap the crop.

*Purvis's Authority.*—*Brodie*, July 7, 1777, (Ap. 1. Tack, 8.); *Wight*, &c. Feb. 10, 1796, (5446); *Marquis of Tweeddale*, Nov. 19, 1816, (F. C.)

*Defender's Authority.*—*Fullerton*, March 4, 1814, (F. C.)

H. DAVIDSON, W. S.—CAMPBELL and ARNOTT, W. S.—Agents.

J. BROWN, Pursuer.—*Moncreiff—Wilson.*

No. 204.

G. NIELSON and Others, Defenders.—*Fullerton.*

*Conditional Agreement.*—The proprietor of a piece of ground between two streets, having agreed to constitute a servitude over it *non edificandi*, on condition of all the feuars paying a certain consideration, held to be freed from his obligation by some of them refusing to accede, and the others not agreeing to make good the whole amount stipulated; but bound to repeat any sums received by him.

BROWN, the proprietor of a space of ground lying between Salisbury and Brown streets, Edinburgh, signed the minutes of an agreement, which were also subscribed by Nielson and others, who were feuars in these streets, whereby he agreed to grant a servitude not to build on this intervening space, (which was to be enclosed by the feuars,) on condition of receiving from each of them a certain yearly feu-duty per foot of their feus, two thirds of which were to be bought up at eighteen years purchase. Several of the feuars, however, having refused to become parties to the agreement, and to pay their proportion, Brown raised an action against all the feuars, concluding to have it found that they were bound to pay the stipulated consideration, or, alternatively, that the agreement should be declared to be at an end. Defences were entered for Nielson &c., who had agreed to pay the stipulated feu-duty, and who contended that, quoad them, Brown's obligation was binding, notwithstanding the non-accession of all the other feuars. The Lord Ordinary, however, after giving them an opportunity to accept an offer made by Brown to execute a bond of servitude, on their securing him in payment of the stipulated feu-duty, decerned in terms of the alternative conclusion of the libel, on their declining to accept the offer; but found that Brown was bound to repeat to the defenders the money paid by them, and the expenses incurred in enclosing part of the ground in question; and the Court, after allowing a second opportunity to accept this offer, unanimously adhered.

Dec. 3. 1825.

2d DIVISION.  
Lord Cringliff.  
F.

SCOTT and BOOG, W. S.—W. HUNT, W. S.—Agents.

No. 205.

A. M'DONALD, Pursuer.—*Maidment*.W. STUART and Others, Defenders.—*Cockburn—Smythe*.

*Res Judicata*.—A party having raised an action, partly criminal and partly civil, before a Sheriff, and decree being pronounced both for fine and damages, and the decree having been reversed by the Court of Justiciary in respect of irregularities—Held that this afforded to the defenders a sufficient defence against a new action of damages.

Dec. 6. 1825.

1st DIVISION.  
Lord Meadow-  
bank.

H.

M'DONALD raised an action in the form of criminal libel, with concurrence of the procurator-fiscal, against Stuart and others, before the Sheriff of Stirling. He there stated, 'that by the laws of this and every other well-governed realm, the maliciously assaulting, beating, bruising, wounding, or otherwise abusing and maltreating any of his Majesty's lieges, to the effusion of their blood and injury of their persons, are crimes of an heinous nature, and the committers thereof severely punishable; and the said crimes are highly aggravated when committed on the public highway, and by means of stones, or the like dangerous instruments: Notwithstanding whereof, true it is, that Walter Stuart &c., defenders, are both or each, or one or other of them, guilty of the foresaid crimes, aggravated as aforesaid, or actors or actor, art or part, in so far as, &c. There then followed an 'at least' clause, after which there was a conclusion that the 'defenders ought and should be decerned and ordained to make payment to the private complainer, each of them, of the sum of £200 sterling, more or less, as I or my substitutes may be pleased to modify, in name of damages, solatium, and reparation for the foresaid violent, cruel, and most barbarous assault and injuries; and they ought also each to be fined and amerced in the sum of £50 sterling to the complainer, the procurator-fiscal, to be applied as I or my substitute shall direct;' and there was a further conclusion for imprisonment till these sums should be paid, and caution found to keep the peace. The defenders were in consequence ordained to find caution to attend all the diets of Court; and after a proof had been adduced, the Sheriff found the assault proved, 'and in respect thereof, and that no circumstance of alleviation has been proved, while it appears that the assault was wholly unprovoked and premeditated, finds each defender liable in £10 of damages to the private complainer, and decerns: Further fines and amerciates each defender in £5 sterling, payable to the procurator-fiscal ad vindictam publicam, and ordains them to find sufficient caution, acted in the Sheriff Court books

‘ of Stirlingshire, that they shall keep the peace towards the  
 ‘ private complainer for the period of twelve months from this  
 ‘ date; and ordains the defenders to be imprisoned in the tolbooth  
 ‘ of Stirling till they pay said fines, and find such security;’  
 and found them liable in expenses. After this judgment had  
 been carried into effect by imprisonment, Stuarts presented a  
 bill of advocation to the Court of Justiciary; and that Court,  
 ‘ having considered the foregoing bill of advocation, and heard  
 ‘ counsel upon the merits of the case, in respect this is a criminal  
 ‘ process, and of the irregularities in the proceedings had there-  
 ‘ in, suspend the sentence complained of simpliciter, and grant  
 ‘ warrant for the immediate liberation of the advocates; advo-  
 ‘ cate the cause, and find expenses due to the advocates.’

M'Donald, conceiving that by this judgment the original  
 action was entirely extinguished, brought an action before the  
 Court of Session, concluding for damages. Against this it was  
 pleaded in defence, 1. That by the judgment of the Court of  
 Justiciary, that of the Sheriff had been suspended simpliciter,  
 which was equivalent to an absolutor from the whole conclusions  
 of the action; or, 2. That if it should be held as applying  
 merely to the criminal conclusions, then that part of the sentence  
 as to damages remained in force, and therefore formed a *res*  
*judicata*. The Lord Ordinary, ‘ in respect of the conclusions  
 ‘ *ad civilem effectum* in the action before the Sheriff Court, and  
 ‘ of the sentence of the Sheriff Court pronounced therein, sus-  
 ‘ tained the defence of *res judicata*, and dismissed the action as  
 ‘ incompetent.’ A representation having been offered, he refused  
 it, with the explanation, that ‘ the meaning of the Lord Ordinary  
 ‘ was, that the representer, having chosen to raise an action  
 ‘ with conclusions partly civil and partly criminal, in which he  
 ‘ has proved unsuccessful, is not entitled to the remedy of an  
 ‘ ordinary action of damages in the Civil Court.’ M'Donald  
 having reclaimed, the Court, by a majority, adhered.

**LORD PRESIDENT.**—If the Court of Justiciary had affirmed the judg-  
 ment of the Sheriff, would not this have been a *res judicata* in  
 favour of the pursuer? I apprehend it would; and if so, will it  
 not have the same effect in favour of the defenders, when it has  
 been reversed? If the sentence were applicable only to the criminal  
 matter, then the judgment of the Sheriff on the civil conclu-  
 sion stands. But the difficulty here is, that the Court of Justiciary  
 say they have heard on the merits. The case of Gordon is en-  
 tirely different from the present one. Gordon was accused of steal-  
 ing bills, but he was found not guilty of the theft. The pur-

suer then said that Gordon was in possession of the bills; and therefore, whether he was guilty of a theft or not, he was bound to restore them. Here, however, the conclusions are not alternative, but are merely of a different character, the one being for punishment, and the other for damages.

**LORD BALGAY.**—The Court of Justiciary do not say that they pronounced judgment in respect to the merits, but only that they had heard on the merits.

**LORD GILLIES.**—I have some recollection of the case having been pleaded in the Court of Justiciary; and my impression is, that the sole ground of decision was, that the defenders were not present at sentence being pronounced. I am at least certain that we did not proceed on the merits, and the words which have been introduced into the interlocutor must have been done so *per incuriam*; or if not, they must have been so on the understanding that the whole proceedings were quashed; and therefore we must look at this case as if no such action had existed. It is impossible that the Court of Justiciary could have pronounced judgment on the merits of the civil conclusion, because they had no power to do so, and therefore it rather appears to me that this action is competent. I think that the case of Gordon is an authority in favour of the pursuer, and that he is entitled to the redress which he demands.

**LORD CRAIGIE.**—This is an important question, and I think that there should be some explanation with the Court of Justiciary, so as to prevent cases similar to the present being affected quoad the civil conclusions, where it has been found that there have been irregularities. In relation to the criminal part, I agree with the Lord President that Gordon's case is different from the present one; but it decides that where there are two conclusions, one civil and the other criminal, in a case before the Justiciary Court, the party may adopt either. In this case, however, the judgment is of such a nature as to embrace the whole case, and I am therefore afraid that we cannot give the pursuer that redress which he asks.

*Pursuer's Authorities.*—Roger, Nov. 24. 1820, (F. C.); 2 Hume, 69; Bontin, Nov. 27. 1739, (14044, and Elchies, No. 5. Proof); 2 Dow, 314; Gordon, April 5. 1731, (Craigie and Stewart's Ap. Ca. p. 10.)

J. J. FRASER, W. S.—J. BAIRD, W. S.—Agents.

G. YEATS, Pursuer.—*Cockburn*.  
R. RAMSAY, Defender.—*Small Keir*.

No. 206.

*Slander*.—A summons, averring that certain calumnious statements made judicially by a procurator, were done so maliciously, remitted simpliciter to the Jury Court.

RAMSAY, an advocate in Aberdeen, was employed as agent for the raiser of a process of multiplepoinding, in which appearance was made by certain parties as claimants, for whom Yeats, also an advocate in Aberdeen, acted as agent and mandatory. In the course of the proceedings, and in reference to a letter on which Ramsay's client founded, the following statement was inserted in a pleading by Ramsay:—'This letter was given by the pursuer's procurator to Mr. Yeats, and he has thought proper, before re-turning it, to alter some of the words, which is not very honourable.' An action of damages was then brought by Yeats against Ramsay, in which he alleged that the latter had been in the practice of slandering him by written pleadings in causes in which he was professionally engaged as a procurator in the Courts before which he practised; and in particular that the above statement was false, malicious, and unfounded,—that the injurious aspersions had been maliciously persevered in, and that Ramsay had repeatedly expressed his determination to continue them. In defence, Ramsay pleaded that the action was irrelevant, 1. Because the expressions had been made use of by him as an agent in the course of judicial procedure, and in the discharge of his professional duty, and sine animo injuriandi; and, 2. That, so far from being influenced by malice, he had offered to retract the statement, provided Yeats would declare that it was not true. To this it was answered, that the allegations in the libel must, in hoc statu, be held to be true; and that as malice was offered to be established, Ramsay could not protect himself by pleading his professional character. On hearing the parties, the Lord Ordinary, in respect he was of opinion 'that there arises in this case a question of relevancy,' appointed Ramsay to give in a minute upon this point; and thereafter, on advising it with answers, reported the question to the Court. Ramsay then repeated the pleas which he had already advanced; and Yeats further contended that it was not sufficient to bar a remit to the Jury Court that there was a question of law or relevancy, but that it must be a question 'which ought to be decided previous to the remit of the cause to the Jury Court;' that it was scarcely possible to figure a case which did not involve, more or less, a question of relevancy;—and that if it were to be held that it was sufficient to prevent a

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remit that such a question might be raised, the statute as to the Jury Court might be easily defeated. The Court remitted the case to the Jury Court, and found Ramsay liable in the expenses incurred by this discussion.

The Judges were unanimously of opinion, that this case ought at once to have been remitted to the Jury Court; and it was observed that there was no question of relevancy which required to be decided before trial, seeing that there was a distinct allegation of the statement having been made falsely and maliciously.

*Defender's Authorities.*—1. Bank. 10. 83; 4. Enk. 4. 80; Fortenach, Nov. 18. 1829, (F. C.); Haggart, June 1. 1821, (ante, Vol. I. No. 54); Davidson, May 12. 1821, (ante, Vol. I. No. 2.)

Æ. M'BEAN, W. S.—J. HUNTER, W. S.—Agents.

No. 207. E. Bow and Others, Pursuers.—*D. of F. Cranstown—Foraysh—Fullerton.*

PATRONS OF COWAN'S HOSPITAL, Defenders.—*Sol.-Gen. Hope—Moncreiff—Murdoch.*

*Mortification—Title to Purvus—Corporation—Hold.*—1.—That a corporation may sue by a committee appointed by a corporate act;—and, 2.—That any individual having interest in a charitable fund may sue the managers to account for their administration.

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Lord Cringletie.

B.

In the year 1637, John Cowan, a merchant in Stirling, bequeathed 40,000 merks, to be vested in lands, 'for sustaining and entertaining,' in an hospital to be built thereon, 'twelve decayed guild-brethren, actual burgesses and indwellers of the said burgh, at least so many of them as the rent thereof conveniently may sustain; of the which hospital or alms-house the said provost, bailies, minister, and council of Stirling now present, (with consent of the granter's brother,) and who shall happen to be for the time, be now and in all time coming perpetual and undoubted patrons, with the right of presentation of the beadmen and poor thereof, and rulers and governors of the rents and revenues of the same, and haill orders of the house, and affairs thereof.'

The property purchased under this mortification continued to be managed by the town-council and first minister of Stirling as patrons. In 1822 they entered into an arrangement with one of their own number, to whom two of the hospital farms had been let, whereby they took one of the farms off his hands. Of this agreement, as having been entered into for corrupt purposes, to the great loss of the hospital funds, an action of reduction, concluded



ing likewise for payment of £5000 as the amount of loss; to be applied in the same manner as the other funds of the hospital, was raised at the instance of Bow and others, 'guild-brethren and 'burgesses of the burgh of Stirling, for themselves, and as a committee empowered by the guildry incorporation of said burgh, and as representing the said guildry incorporation and hail 'members thereof,' in virtue of an express appointment of the guildry at a general meeting, to institute and carry on this and certain other actions for their behoof. To their title to pursue this action the patrons of the hospital objected, and contended, 1. That no rights or benefits were conferred by the deed of mortification on the guildry incorporation, and that consequently it had no title;—2. That supposing the corporation to have a title, it could only sue under its proper nomen juris of the dean and corporation, and could not transfer its right to a committee; and, 3. That neither had the pursuers, as individual guild-brethren, a title to pursue any action calling the patrons to account, particularly in regard to what they contended was an act of ordinary administration. The Lord Ordinary repelled these objections, and sustained the title to pursue; and the Court unanimously adhered.

**Lord GLENLEE**.—There may be room for a reservation in the interlocutor as to the petitory conclusion for payment of £5000 to the pursuers, as to which I doubt if they have a title; but otherwise the interlocutor is right. The objection to the corporation suing by a committee is not valid. A corporation, as well as an individual, may appoint a commissioner to sue for their behoof; and all that is requisite is sufficient evidence of the commissioner's authority. In the present case, the committee sue in virtue of a corporate act of the whole body, not appointing them generally to judge of what actions they should raise, but specially to raise this action. The summons in the case of the Writers to the Signet v. Graham bore no reference to any corporate act of the Society authorizing the Keeper and others to pursue. The office-bearers took it on themselves, qua such, to raise the action. The position, that no one but a patron of the hospital, or the heir of the granter, can challenge the administration, cannot be maintained; and in this case the patrons, by their own act and deed, have agreed that certain matters, of the same kind as those complained of here, shall not be done without consent of the guildry. It is said that the act challenged is one of common administration; but it is no such thing; it is an act of extraordinary administration.

**Lord PITMILLY** concurred, and further observed, that the question must be considered to have been settled in the former action against the patrons, in 1777, by Christie and others.

**LORD ALLOWAY.**—It is most important that all trustees managing charitable funds should know that every person having an interest to complain of their actings has also a title to call them to account. In the present case, the members of the guildry are alone entitled to the benefit of the mortified fund; and any individual guild-brother, as well as the corporation itself, has a title to pursue. The title would, I conceive, be sustained even at the instance of a single member; but here the whole corporation pursue, for they are as much entitled as individuals to pursue by commissioners, and I can draw no distinction between the reductive and petitory conclusions. The latter follow as a necessary consequence from the former.

**LORD JUSTICE-CLERK.**—The interlocutor of the Lord Ordinary is alike founded on principle and previous decisions. The case of Christie is in every respect the same, and in regard to this very mortification, and that of Heriot's Hospital is much stronger as to want of sufficiently direct interest; and the very same arguments were overruled there, which are maintained here. But though there were no precedents, there could not be a doubt on principle. The real interest under the trust is vested in the guildry alone, and any one individual guild-brother libelling a proper summons of mismanagement, has, without authority of the corporation, sufficient title to make the patrons account for their administration; and it is of great importance that it should be known throughout the country, that persons managing such funds are accountable to every one having a proper interest in the charity.

*Pursuers' Authorities.*—Merchant Company and Traders of Edinburgh, (Case of Heriot's Hospital,) Aug. 9. 1765, (5750); Christie, &c. (Case of Cowan's Hospital,) July 6. 1774, (5755.)

*Defenders' Authorities.*—Wilson, &c. June 7. 1823, (ante, Vol. II, No. 359); Writers to the Signet, Feb. 13. 1823, (ante, Vol. II. No. 192,) as reversed in the House of Lords.

D. FISHER, — J. FORMAN, W. S. — Agents.

T. M. ANGUS.—*Greenshields—More.*

No. 208.

Mrs. E. ANGUS.—*Moncreiff—Jameson.*

Competing.

*Succession—Heritable and Moveable—Trust—Clause.*—A party having, by his deed of settlement, conveyed his whole property to trustees, with power to convert it into money, for the purpose of dividing and paying over the residue in certain shares to his children, their heirs, executors or assigns, and one of the children having predeceased—Held,—1.—That the child's share was moveable, and descended to his executors, notwithstanding greater part of the trust-funds being heritable;—2.—That a codicil revoking the provisions in favour of one of the children, did not extend to her right to take up the share of her brother predeceased, as his executor.

THE late William Angus, by trust-deed of settlement, conveyed to trustees his whole property, 'with full power to the said acting trustees or trustee to sell and dispose of my whole subjects before mentioned,'—to uplift the whole debts and sums of money due to the truster,—to grant discharges, compound debts, 'and to call and pursue all and sundry persons liable to my trust-estate, and to do all necessary diligence for the recovery of the whole premises, and converting the same into money.' The deed further authorized the trustees to enter into submissions, to appoint factors, &c.; 'and generally with power to the said trustees or trustee acting for the time, to do and execute all other things necessary for settling, transacting, and disposing of, or rendering effectual, and converting into cash my said subjects, in the same way and manner as I could do myself, if in life.' The purposes of the trust, after payment of certain legacies, were as follows:—'I hereby ordain and appoint the whole free residue or remainder of my estate, real and personal, after satisfying the before-mentioned burdens and provisions, to be divided into four just and equal shares, as soon after my decease as circumstances will permit; and that being done, I authorize, ordain, and appoint my said trustees or trustee to lay out and invest on undoubted security one of the said fourth shares for the use and behoof of my son, the said Charles Angus, in liferent, for his liferent use only, and to his children lawfully procreated or to be procreated, and in life at his death, in fee, equally amongst them, share and share alike: Declaring always, and hereby providing, that the part or share falling to each of the children of the said Charles Angus shall remain under the care and management of my said trustees or trustee, until said children shall respectively attain the age of 21 years complete, or be married with the approbation of the majority of my said trustees then acting, and to whom I hereby grant and commit ample powers

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' to settle and establish the share of each of the said children, in  
 ' such manner, and with and under such conditions and stipu-  
 ' lations, as may then be judged expedient to render the same  
 ' most useful and beneficial to each of the said children, and their  
 ' respective representatives. Another of the said fourth shares  
 ' I authorize, ordain, and appoint my said trustees or trustee to  
 ' pay over to my second son, the said William Angus, his heirs,  
 ' executors, or assignees. Another of the said fourth shares I  
 ' authorize, ordain, and appoint my said trustees or trustee to pay  
 ' over in equal shares to Robert, &c. Hornells, the children of  
 ' my now deceased daughter Mary Angus, by William Hornell,  
 ' late hairdresser in Wigton, deceased, or such of them as may  
 ' then be in life, or have left lawful issue, such issue being to  
 ' have the share of the deceased parent ; and their representatives  
 ' and assignees. And the remaining one of the said fourth shares  
 ' I ordain and appoint to pertain and belong to my daughter  
 ' Elizabeth Angus, spouse of William Biggam, cabinet-maker in  
 ' Liverpool, &c. ' Declaring, and hereby expressly providing, that  
 ' all and every sum or sums which shall, in virtue hereof, lapse  
 ' and return to my said trustees or trustee during the continuance  
 ' of this trust, shall pertain and belong to my lawful grandchildren  
 ' then in life, share and share alike, &c.

Mr. Angus added a codicil to his trust-deed on the 9th of De-  
 cember 1814, which contained this clause :—' Moreover, my  
 ' daughter Elizabeth Angus in Liverpool, widow of the now de-  
 ' ceased William Biggam, having requested me instantly to ad-  
 ' vance to her £2000 sterling, in lieu of the provisions provided  
 ' to her by the foregoing trust-deed, to be laid out by herself on  
 ' heritable security over the lands and estate of Urral in the  
 ' parish of Kirkcowan in the county of Wigton ; and I having  
 ' agreed and bound myself to make the said advance in full of all  
 ' she and her issue could ask or demand in virtue of the said trust-  
 ' deed, or in, through, or by my decease, therefore I also hereby  
 ' alter and revoke the whole provisions made and constituted by  
 ' the foregoing trust-deed in favour of the said Elizabeth and her  
 ' said now deceased husband, and the issue of her body ; and I  
 ' hereby declare the same to be now of no more effect than if such  
 ' had not been therein written.'

Mr. Angus died in 1822, leaving the greater part of his for-  
 tune in heritable bonds. His son William had predeceased him  
 without leaving issue ; and the question now arose, whether the  
 fourth share provided to him by the trust-deed, to the extent of  
 his proportion of the heritable property, descended to his heirs,  
 or to his executors ? To try this question, the trustees raised a

multiple-pledging, in which claims were lodged for Mrs. Elizabeth Angus, William's only surviving sister, and Thomas McQuistan Angus, the only son of his eldest brother deceased. For the latter it was contended, that as the testator had not directed, but merely empowered, his trustees to convert his estates into cash, there was no destination to control the natural order of succession; and that the trustees, as coming in the place of the truster, must be considered to have held the property, whether heritable or moveable, for the heirs entitled by law to succeed thereto, these having in both cases merely a *jus crediti*, descending, however, to the heir or executor, according to the nature of the subject to which it related. On the other hand, Mrs. Elizabeth Angus contended, that the clear intention of the testator, as appearing from the whole deed, was, that all his property should be converted into money, and the general residue paid over in certain proportions;—that the rights of those to whom these shares were destined, being rights not to any special subject, but to a proportion of the general residue, were strictly moveable in their nature, and attachable only by arrestment, and consequently descending to executors, not to heirs.

The Lord Ordinary found, 'that the directions of the trust-deed of William Angus the father, which is expressed in these words,—'Another of the said fourth shares I authorize, ordain, and appoint my said trustees or trustee to pay over to my said second son, the said William Angus, his heirs, executors, or assigns,—must be interpreted to direct the said payment to be to the heirs in *mobilibus*, or executors of the said William Angus the son,—not to his heir in *immobilibus*; and therefore finds that the claimant, Mrs. Elizabeth Angus, has right to the said share, in preference to the other claimant, Thomas Angus.'

Against this interlocutor the heir reclaimed; and at the advising, in addition to his former pleas, he contended that the codicil in the trust-deed revoking all provisions in Elizabeth's favour, must be held to extend to this indirect provision to her as executor of William, which opened before the testator's death, as well as to the direct provisions in her favour. The Court unanimously adhered to the Lord Ordinary's interlocutor.

**LORD GLESLKE.**—There are no grounds for altering this interlocutor.

The point now stated, as to the effect of the codicil, is founded on this,—that, on the legacy to William having lapsed, Elizabeth claims as a conditional institute, and that her right therefore as a provision in her favour falls under the clause in the codicil. But, looking at the whole codicil, it is plain that the testator could only

have meant it to apply to those provisions which he clearly saw she was entitled to under the deed, and not to affect any indirect or accidental benefit which might afterwards accrue. As to the general question, this case has no analogy to that of *Durie*, mainly founded on by the heir. There the trust was not for gathering in the proceeds, and distributing them among a number of persons. The trustees were directed by the testator to hold the universitas, and in particular a certain heritable bond, for behoof of the heirs of his body,—whom failing, of the heirs according to the destination in the settlement; so that from the beginning it was held for the behoof of special heirs. The legatees had no nexus on any particular subject; but the heirs had. The universitas was left to be held for the destined heirs from the beginning, and not merely for the execution of purposes of trust. The present case is very different;—there is no beneficial interest in the subjects constituted to the parties, but only a claim for the share of the residue, which must descend to executors.

**LORD PITMLLY** concurred. As to the argument on the codicil, it is not well founded. The testator there refers solely to the special provision of the one fourth share. On the merits, the Lord Ordinary's view is very simple and decisive, and the whole argument for the executor is most successful, and in nothing more so than in pointing out the great distinction between this case and that of *Durie*. In both cases, the right was that of calling the trustees to account; but in *Durie's* it was a right to call them to account for a special heritable subject, and here it is a right to call them to account for a share of the residue of the whole estate. This right might have been attached by arrestment, and it would have lapsed by the predecease of William, had there been no destination to heirs and executors; and these are criteria which establish it to be of a moveable nature, and descendible to executors.

**LORD ALLOWAY** entertained the same opinion on both points. His Lordship observed—It is impossible ab ante to presume an intention on the part of the testator not to settle the destination of his property, but to leave it to be determined by the circumstance of the trustees selling his heritage, or retaining it unsold. All cases of this kind depend on the will and intention of the testator. The grounds in the Lord Ordinary's interlocutor are sufficient; but the true rule is the intention of the testator. If this be not clearly expressed in the deed, the nature of the property may assist in construing it; but if there ever was an *enixa voluntas* to convert an estate into money, it appears in the present case.

**LORD JUSTICE-CLERK** coincided in these opinions.

*Heir's Authority.*—*Durie*, Nov. 30, 1791, (1624)

*Executors' Authority.*—*Wilson*, May 31, 1809, (1767)

**BURNS and ALLISTER, WLS.**—**DONALDSON and HENDER, W. S.** Agents.

D. MILLER, Pursuer.—*Skene.*

No. 209.

P. DUNCAN and R. Low, Defenders.—*Alison—J. Henderson jun.**Reduction—Title to Payment—Process—Circumstances in which it was held,—1—*

That a bill having been reduced in a question between the holder and drawer, the holder could not found an action on it against the acceptor;—and,—2—That the party who had so accepted the bill, (which had been given in security of a prior debt due by his father to the holder,) and in relief of which he had obtained an heritable security from his father, and the father having become bankrupt within sixty days thereafter, could not avail himself of the security.

IN June 1820, James Duncan, merchant in Dundee, drew on certain persons two bills, each for £300, which he discounted with and indorsed to the Dundee Bank. These bills were refused to be accepted; and James Duncan having become embarrassed in his affairs, an arrangement was entered into, by which his eldest son Patrick agreed to accept a bill for £615 to his father, who was to indorse it to the Bank, in satisfaction of the two bills for £300, on condition that his father should convey to him certain heritable property in relief. This was accordingly done, and the bill was indorsed to the Dundee Bank. Within sixty days from this transaction, James Duncan was rendered bankrupt, and a sequestration was awarded of his estates, on which Miller was appointed trustee. Miller then brought two actions, one against Low, as representing the Dundee Bank, founding on the act 1696, and concluding for reduction of the indorsation of the bill for £615, and for delivery of it; and another against Patrick Duncan, founding on the act 1621 and 1696, and concluding for reduction of the heritable security. In defence against the first of these actions the Bank maintained, 1. That as Patrick had accepted the bill for the accommodation of his father, Miller had no interest to reduce the indorsation, because he could recover nothing in virtue of the acceptance; and, 2. That as the bill was merely a renewal of the two prior bills, for which value had been given, and which formed a legal charge against the estate, it was not reducible. Lord Meadowbank decerned in terms of the libel in the action against the Bank, and the Court adhered, ‘reserving the effect of the bill for £615 by Patrick Duncan, the son of the bankrupt, in so far as the petitioners (the Bank) may operate thereon against the said acceptor; and also reserving to the petitioners to rank upon the sum of £600 of original debt against the bankrupt estate, and reserving to the respondent all objections, as accords.’

In reference to the action against Patrick Duncan, he pleaded in defence, that the transaction did not fall under the bankrupt

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statute; but Lord Meadowbank decerned in terms of the libel. Lord Mackenzie, however, after certain special findings, and that there was no evidence of any intention to constitute an undue preference to the Bank, found, 'That the said bond and disposition does not appear reducible as fraudulent at common law, no actual fraud therein being proved, or competently offered to be proved; that the said bond and disposition cannot be held to have been granted for a future debt, in respect that it was granted to the defender simul et semel with the granting of the first bill by him, in lieu of which the second was substituted;—that the said bond and disposition cannot be reduced under the statute 1621, as an alienation to a conjunct and confident person, without just price paid, in respect full value was given for it at the time, viz. the bill granted by the defender for the sum contained in the bond and disposition, which bond and disposition was in fact granted only for the defender's relief;—that the defender's father became bankrupt within sixty days of the transaction, but the said bond and disposition cannot be reduced under the statute 1696, because it was not granted in security or payment to a prior creditor, but for value instantly given by the defender to his father, viz. a bill for the full amount, and which bill was, in case of bankruptcy ensuing within sixty days, secured by the statute to his father's estate against conveyance to prior creditors, as well as the property which the bond and disposition affects;—that the question how far the whole transaction, taken together, might have been reducible under that statute, as constituting, within the sixty days, a new ground of preference to the Bank in an action in which all parties were called together, or how far the bond and disposition might fall in case the indorsation to the Bank were reduced, and the defender's bill given up to him, are not hujus loci, this action being brought to reduce the bond and disposition separately and absolutely, and without restoration to the defender of the bill granted by him, or discharge thereof;' and therefore altered the interlocutor, and assoilzied the defender Patrick Duncan. But Lord Eldin altered this interlocutor, and decerned in terms of the libel, in respect 'that the bond and disposition in security was granted in pursuance of a collusive plan, to which Patrick Duncan was a party, intended for the purpose of giving a partial preference to the Dundee Banking Company, to the prejudice of the other creditors of James Duncan, at a time when he was insolvent and in bankrupt circumstances, and within sixty days of the sequestration of his estate.' In the meanwhile, the Dundee Bank, in virtue of the above reservation in their favour, raised



an action before the Sheriff of Perthshire against Patrick Duncan; founding on his acceptance, and concluding for payment of the amount. Against this action he pleaded in defence, that as the indorsation in their favour was reduced, they had no title to found on it. This process was then advocated ob contingentiam, and Lord Eldin having decerned in terms of the libel, and these judgments having been brought under the review of Lord Medwyn, he, after issuing a note expressing an opinion that he could not concur in the interlocutors of Lord Eldin, as the case presently stood, and that he was embarrassed by the reservation made by the Court in favour of the Dundee Bank, reported the case to the Court; and, on advising informations for the respective parties, the Court held, 1. That by their judgment in the action against the Dundee Bank, the indorsation had been entirely set aside, and that the object of the reservation was merely to enable the Bank to raise action against Patrick Duncan on any other medium concludendi, and therefore advocated the case at their instance, and assoilzied him; and, 2. That, in the circumstances, the judgment of Lord Eldin, reducing the security in favour of Patrick Duncan, was well founded, and therefore adhered to his interlocutor.

**LORD BALGAY.**—I never saw reservations in interlocutors do any good. They tend to produce litigation and misapprehension, and therefore ought to be avoided. This question, when formerly before us, was entirely between the trustee and the Bank. We set aside the indorsation altogether; and therefore the claim of the Bank to possession of the bill necessarily fell to the ground, and they were bound to have delivered it to the trustee. It is no doubt true, that at common law, and independent of the bill, the Bank may have a claim against the acceptor. If they can make this out in a proper action, good and well; but they are not in shape here. Their action against Patrick Duncan, the acceptor, is founded exclusively on the bill; and as the Bank have no title to it, we must assoilzie him from that action. With regard to the action by the trustee against Patrick for reducing the heritable security, I think that the judgment of Lord Eldin is perfectly correct, and ought to be adhered to.

**LORD PRESIDENT.**—The reservation is certainly not well expressed. Our meaning was, that although we had set aside the bill, yet if the Bank could show that they had suffered loss or damage through any act on the part of Patrick, they might have recourse against him in an action founding on these facts. I am also of opinion, that the judgment reducing the heritable security is well founded, and that this is not at all like the case of *Sir William Forbes and Company*.

**LORD GILLIES.**—Reservations ought not to be introduced into our interlocutors, more especially in relation to third parties. In consequence of our decision in the former case, the Bank could have no action on the bill. But their summons is founded entirely on that document, and therefore must be dismissed. It has been said that the heritable security, having been given for a present onerous cause, must be sustained. But this is not the fact. The Bank held two dishonoured bills of the bankrupt; and an arrangement was then entered into for securing them in payment of their contents; and the bill by Patrick Duncan, and the security, were granted for this purpose. But this was just a security for a prior debt; and it is proved that Patrick Duncan was participant in, and a party to this arrangement; so that it must be set aside as to all the parties, in order to do justice to the other creditors.

*Pursuer's Authority.*—2 Bell, 227. 236; 222. 221.

D. M'LEAN, W. S.—A. ROBERTSON, W. S.—G. LYON, W. S.—Agents.

No. 210.

T. BELL, Advocator.—*R. Bell.*

Mrs. HALLIDAY and HUSBAND, Respondents.—*Graham Bell.*

*Submission—Terce.*—Held,—1.—That it is competent to refer to notes of an arbiter in a submission, who has only decided part of the claims submitted to him, to ascertain what points he has actually determined;—2.—That a widow is entitled to compensation from the heir, for part of lands sold prior to the fixing of her terce lands.

Dec. 8. 1825.

2d DIVISION.  
Lord Macken-  
zie.  
M'K.

THE late Thomas Bell died, in 1774, infeft in the property of Skellyholm, leaving a widow, the respondent, (who shortly afterwards married one Halliday,) and an infant son. No portion of the property was set aside as the terce of the widow, who held a joint possession for her third, her husband being likewise tenant in the remaining two-thirds. They resided on the lands, and the heir lived in house with them. Shortly after he attained majority, he sold part of the property for £240, which he expended partly in improving the lands, and partly in building a house for Mrs. Halliday and her husband. In 1805, in order to have lands set apart for the terce, and to determine different claims existing between the parties, a general submission was entered into, in which the only question decided by the arbiter was the extent of Mrs. Halliday's terce lands. The submission having eventually expired, Mrs. Halliday raised an action before the Sheriff of Dumfries-shire, concluding to have it found that she was entitled to the interest of one-third of £240, as having been disappointed of her terce by the sale of lands to that extent. The heir pleaded in defence, that this claim had been settled by

the decret-arbitral; but it appearing from some holograph notes of the arbiter, drawn out after he had given his decree, that it had reference only to the property as it then existed, and that this was one of the points remaining for decision, the Sheriff decerned in Mrs. Halliday's favour. The heir then brought an advocacy, in which he further proposed certain counter claims for ameliorations on the lands before the terce was set apart, and for building the house of which Mrs. Halliday had got possession.

The Lord Ordinary remitted simpliciter, and the Court unanimously adhered.

Their Lordships held, that although they could only look at the arbiter's notes to ascertain whether he had decided this claim in awarding the terce, they were entitled to look at them to that effect; and being satisfied that it had not been disposed of by the arbiter, they were clear that Mrs. Halliday was entitled to an equivalent for the terce of the lands sold;—and as to <sup>the heirs</sup> ~~the~~ counter claims, that it would be open to him to establish them in an action at his instance.

W. MARTIN,—JOHNSTON and LITTLE,—Agents.

D. CAMERON, Pursuer.—*Moncreiff—McNeill.*

No. 211.

COMMISSIONERS of the CALEDONIAN CANAL.—*Sol.-Gen. Hope*  
—*Walker.*

*Contract.*—A proprietor having sold part of his lands to the Parliamentary Commissioners for making the Caledonian Canal, and accepted a certain sum in lieu of all he could claim of damage, held not to be barred from insisting on the performance of all the stipulations provided in the act of Parliament in favour of proprietors of land assumed by the Commissioners.

PART of the lands of Lochiel being required for the Caledonian Canal, the Commissioners, without having recourse to a Jury in terms of the act of Parliament, entered into an agreement with Cameron the proprietor, by which, for the sum of £2000, he sold them the quantity of ground required; declaring, 'that the price paid to me is in full, not only of the value of the said lands hereby conveyed, and of all damage done to the rest of the lands of which they are a part, by their being hereby detached from them, but of all claims and demands competent to the tenants and possessors thereof.' After the canal was made, Cameron required the Commissioners to erect certain bridges, which he conceived he was entitled to, under the general provision in the act of Parliament relative to that matter. This

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2d Division.

Lord Mackenzie.

sic.

F.

being resisted by the Commissioners, on the ground that, by the terms of his agreement, he had accepted the price paid him in lieu of all claims, whether on the statute or otherwise, he raised an action, concluding to have it declared that his claims were not excluded by the terms of the contract. The Lord Ordinary found, 'that the contract which took place between the pursuer and the said defenders in the year 1806, and the implement of that contract which has taken place on the part of the said defenders, does not exclude the pursuer from using any proceedings, in respect to bridges, which may be competent to him, as proprietor of the land adjoining to the canal, under sections 53. and 54. of the act 44. Geo. III. c. 62;' and the Court adhered.

Their Lordships were of opinion that Cameron, in selling his land to the Commissioners, must have understood that they were to execute every thing which they were by the statute bound to do; and that the only damage which he had excluded himself from demanding was that arising ex necessitate; supposing the Commissioners to have done every thing incumbent on them.

J. ARNOTT, W. S.—J. HOPE, W. S.—Agents.

No. 212.

J. OGILVIE and D. DAKERS, Pursuers.—*Baird*.

GUTHRIE, MARTIN, and COMPANY, Defenders.—*Currie*.

*This case—Title to Pursue—4. Geo. IV. c. 94.—Held,—1.—That a subtenant of maltures was entitled to pursue an action to have it found that he had right to them, and to decree for those which had been abstracted;—and,—2.—That the above statute does not affect the interests of parties having right to such maltures.*

Dec. 9. 1825.

1st Division.

Lord Eldon.

S.

GUTHRIE, MARTIN, and COMPANY erected a distillery within the burgh of Brechin, and, in terms of the statute 4. Geo. IV. c. 94, prepared their malt in a mill belonging to themselves, and adjacent to their distillery. An action was soon thereafter brought against them by Ogilvie and Dakers for culture; and the title on which they founded was, 1. A tack by the Magistrates of Brechin to Reid and Company of the malt-mills of Brechin, with an obligation to keep them in proper order, and to have persons for grinding the malt brought thither; 2. A subtack by Reid and Company to Ogilvie and Company; and, 3. A further subtack by Ogilvie and Company to the pursuers, Ogilvie and Dakers. In their summons they concluded to have it found and declared, 'that the pursuers, as tacksmen foresaid, have good and undoubted right to receive the accustomed culture and

‘mill-dues for all corns, malt, and other grain used within the liberties of the said burgh of Brechin;’ and that the defenders should be ordained ‘to bring to, and mill or grind at the foresaid mills of Brechin, the whole malt used or intended to be used by them at their distillery, or at any other place within the liberties of the said burgh of Brechin; and to pay to the pursuers, as sub tacksmen foresaid, or their successors, the multure and mill-dues for the same, used and wont;’ or at least to pay a certain specific sum during the currency of the sub tack, and while the defenders should use malt within the burgh.

Against this action it was pleaded in defence, 1. That as the summons contained declaratory conclusions, and the pursuers’ right was merely of a temporary nature, they had no title to pursue; 2. That the extent of their demand was not sufficiently specific; and, 3. That as the above statute obliged distillers to grind their malt at their own mills, it necessarily discharged them from any claim of multure. To this it was answered, 1. That the pursuers were entitled to introduce a declaratory conclusion, to the effect of having the right of the pursuers ascertained, and decree conform to the petitory conclusions pronounced; 2. That the libel was sufficiently specific, and that at all events they were ready to condescend on the extent of their claim; and, 3. That the statute could not discharge the vested rights of third parties, nor entitle the defenders to establish their distillery within the bounds of a thirlage, without being exposed to the burdens therein existing.

The Lord Ordinary found, ‘that the pursuers have produced a title sufficient to authorize the condescendence after mentioned, and appointed them to condescend on what they aver in support of the conclusions of their action.’ To this interlocutor the Court unanimously adhered.

The Judges were of opinion that the pursuers had a sufficient title to insist to the effect of vindicating their own rights, and that the statute could have no effect on the question.

*Pursuers’ Authorities.*—(1.)—4. Stair, 2. 4. 7; 4. Bank. 24. 21; 4. Enk. 1. 4. 6  
4. Enk. 2. 3.

*Defenders’ Authorities.*—(1.)—2. Enk. 9. 32;—(2.)—4. Enk. 1. 4.

J. R. SKINNER, W. S.—H. MACQUEEN, W. S.—Agents.

No. 213.

C. PEEBLES, Pursuer.—*Baird*.R. WATSON, Defender.—*Greenshields—Moncreiff—Cunninghame*.

*Competition—Heritable Security—Public Holding—Process—Held*.—1.—That a sasine taken in virtue of a precept proceeding on an obligation to infest by two manners of holding, and that either by resignation or confirmation, and the sasine not being confirmed, did not vest a real right;—2.—That although such an objection is not libelled as a ground of reduction, it is competent for the Court to entertain it, after a remit to discuss the reasons of reduction;—but,—3.—That the pursuer is liable in the previous expenses.

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1st Division.

Lord Eldon.

S.

JAMES HARKNESS, the proprietor of Glenlean, granted in 1816 a bond and disposition in security to his brother Thomas for £1200, in which the obligation to infest was thus expressed:—  
 ‘In which lands above disposed, I bind and oblige me and my  
 ‘foresaids, upon my charges, to infest and seise the said Thomas  
 ‘Harkness and his foresaids by two infestments and manners of  
 ‘holding, and that either by resignation or confirmation, or  
 ‘both, the one without prejudice of the other.’ The deed contained a procuratory of resignation, and a precept of sasine, in the usual form; but no mention was made of any reddendo; and the date, with the name and designation of one of the witnesses, appeared to have been written on an erasure. On this bond Thomas Harkness took sasine, which was recorded. In reciting the precept in the instrument of sasine, the signatures of the granter and of the witnesses were omitted; and the name and designation of the witness, which were written on an erasure in the bond, were also written on an erasure in quoting the testing clause in the instrument of sasine. This bond and relative sasine were, after some intermediate transmissions, assigned to Watson, who took sasine in 1821, the instrument of which was duly recorded. In 1822 James Harkness became bankrupt; and his estates having been sequestrated, Peebles was appointed trustee, and immediately obtained a special conveyance of Glenlean, and completed his titles. He then brought an action of reduction of the bond and disposition and relative sasine in favour of Watson, on the ground that they were null and void, 1. Because they were erased and vitiated; 2. Because no reddendo was specified; and, 3. Because the signatures of the granter and witnesses had not been engrossed in the instrument of sasine. The Lord Ordinary repelled these reasons, and assolizied the defender. Against this judgment Peebles represented, and stated a new objection, which had not been founded on in the summons of reduction. That objection was, that as there was no obligation to infest de me,—as the precept of sasine had not been confirmed,—and as there was now a third im-

pediment by the title made up in his own favour as trustee, no real right in the lands had been, or could be, constituted by the heritable bond and sasine. In support of this he contended, that although there was an obligation to infeft 'by two infeftments and manners of holding, and that either by resignation or confirmation, or both, the one without prejudice of the other;' yet, as there was no obligation to infeft *de me*, the only obligation which had been granted was to give a public holding of and under his own superior, to be perfected in either of the ways there described, which had not been done. To this it was answered, 1. That as this reason of reduction was not libelled,—as great *avizandum* had been made, and the original reasons had been remitted to the Lord Ordinary, it was not competent to entertain this new objection; and, 2. That in itself it was not well founded, because there was an express obligation to infeft 'by two infeftments and manners of holding;'—that the only two modes which existed in law were an infeftment *a me*, and an infeftment *de me*; and although the clause did not expressly contain an obligation to infeft *de me*, yet it was impossible to construe it so as to find, that while there was an obligation to infeft by two manners of holding, there was only an obligation to infeft in one manner.

The Lord Ordinary, on the 18th of June, reported the case, 'in respect the bond in question contains no obligation to infeft *de me*, and the sasine upon the precept is utterly ineffectual for want of a confirmation, and in respect the summons of reduction contains no reason applicable to the defect of the sasine, and that it will be necessary to apply to the Court for the proper remedy, if such will be given;' and appointed informations upon the whole cause. The other objections were accordingly discussed; but that to which the parties and the Court chiefly directed their attention, was the objection arising from the terms of the obligation to infeft; and the Court, 'in respect of the reasons assigned in the Lord Ordinary's interlocutor of the 18th of June last, and that the bond in question was ineffectual as an heritable security,' reduced in terms of the libel; but found Peebles liable in expenses prior to the period of pleading the objection.

**LORD PRESIDENT.**—The holding in this case is merely *a me*; and I became quite satisfied in the case of Rowand, that a sasine without a confirmation, where there is such a holding, is unavailing to vest a real right. This is even a stronger case than that of Rowand, because in that case there was an order to the Bailie immediately to infeft the disponee, which does not occur in this one.

**LORD HERMAND.**—I am of the same opinion; and as there is here a mid impediment by the intervening title of the trustee, so it is impossible for the heritable creditor to acquire a preferable right.

**LORD CRAIGIE.**—This deed is liable to objections of various kinds. The manner of holding is most inconsistently framed, and there is no reddendo clause, so that in truth there is no proper holding at all.

**LORD GILLIES.**—There are two modes of infestment distinctly mentioned; but there is no obligation to infest de me, and there is then an authority to infest by resignation or confirmation; but no confirmation has been expedite, so that no title has been completed.

**LORD BALGRAY.**—If the words 'by confirmation or resignation' had been left out, there might have been room for argument in favour of the heritable creditor; but, as they have been inserted, they qualify the manner of holding; and therefore, unless the title had been made up in the one way or the other, it could not be effectual. Besides, it will be observed that there is no reddendo; but I do not wish to put the decision of the case on that ground.

*Purser's Authorities.*—1457, c. 71; 1502, c. 91; 2. Craig, 4. 16; Hope's Min. P. 5. 1; Bell's Abst. of Deeds, 148; 2. Bank. 3. 84; 2. Ersk. 7. 9. et seq.; 2. Ersk. Pr. 7. 6; Bell on Pur. Tit. 26; Rowand, June 30. 1824, (ante, Vol. III. No. 141.)

*Defender's Authorities.*—2. Dallas, 457. 464; Bell's Abst. of Deeds, 152; 3. Stair, 3. 14.

W. WADDEL, W. S.—GREIG and PEDDIE, W. S.—Agents.

No. 214.      MRS. MARGARET JACKSON and HUSBAND, Advocate.—  
Jameson—A. Wood.

J. WILLIAMSON and W. HENDERSON, Respondents.—Skene—  
Alison.

*Bill of Exchange—Improbation.—Law Agent—Process.*—1.—A party called on to abide by a bill of exchange sub periculo falsi, having declared that he abided thereby under the qualification that the signature of the drawer and indorser was not truly his subscription, but adhibited by the declarant at his desire, according to an alleged practice of which there was no evidence, the bill held to be improved.—Held,—2.—That a summons on such a bill, not stating it to be signed per procreation, is inept.—3.—That it is a presumption of law, when a retired bill is marked paid without a special receipt, that it has been retired with the funds of the proper debtor; and,—4.—That the possession by an agent of a bill so receipted is no authority to raise an action on it.

Dec. 9. 1825.

2d Division.

Lord Mackenzie.

F.

In 1817 the late Robert Jackson, father of the advocate, at the solicitation of his farm-servant, the respondent John Williamson junior, accepted, along with him, a bill bearing to be drawn by his uncle John Williamson senior. This bill was admitted to have been made for the accommodation of James Williamson,



a brother of the respondent's, and was indorsed, apparently by old Williamson, in payment of rent to James's landlord, who discounted it with the Paisley Bank, from whom it was duly retired on a general marking of 'paid.' Jackson died in 1819, and shortly thereafter an action was raised before the Sheriff of Lanarkshire, in name of Williamson junior, against Mrs. Margaret Jackson, as representing her father the joint acceptor, for payment of one-half of the bill, (which was described in the summons as drawn and indorsed by James Williamson senior,) on the ground that it had been retired by Williamson junior. The Sheriff repelled certain defences pleaded for Mrs. Jackson, and decerned in terms of the libel, with expenses. Having, however, obtained from Williamson a disclamation denying that he had authorized the action to be raised, and passing from all decreets pronounced in it, she gave in a minute, praying to be assolizied. A counter minute was lodged for Henderson the agent, who produced no mandate, but contended that his possession of the bill was sufficient evidence of authority, and entitled him to raise and carry on the action; and the Sheriff, 'in respect the pursuer's agent had possession of the bill when the action was raised, which infers his authority for so doing,' adhered to his former interlocutors. Mrs. Jackson then brought an advocacy, and having discovered, for the first time, that the signature of Williamson senior, as drawer and indorser of the bill, was not truly his subscription, she proponed improbation; on which the Lord Ordinary (Lord Pitmilley) appointed Williamson junior to appear, and abide by the verity of the bill sub periculo falsi. He accordingly emitted a declaration, stating 'that he does abide by the said subscriptions sub periculo falsi, as the subscriptions of John Williamson senior, above designed, and he in like manner abides by the said bill in all other respects;' but 'of his own accord, and although he is not bound to do so under the commission, being examined by the advocators' agent, he declares that the name of John Williamson on the said bill, as drawer and indorser, was written by the declarant at his John Williamson's desire, and in his presence, and that he was in the habit of so signing the said John Williamson senior's name, he being his uncle, to documents of that kind, when desired by him;' and he specified two particular instances in which he had done so, but both of a later date than the bill in question. Along with this declaration there was lodged in process a letter signed by old Williamson, bearing that he had authorized his nephew to subscribe his name for him as drawer and indorser, and that he was in use to employ him in this way, as he was a bad writer,

and could not see well. This letter bore to be written by one Scoullar, a writer in Hamilton; but it afterwards appeared that it had been merely copied by him, at the request of Henderson the pursuer's agent, from a draft drawn out by the latter; and from a receipt on some ordinary piece of business, signed by old Williamson, subsequently produced, it appeared that, contrary to the assertion in the letter, he wrote a very fair hand. The Lord Ordinary, on considering the declaration, found 'that the bill is not a probative document, and that the action cannot be maintained. His Lordship accordingly advocated the cause, and assailed Mrs. Jackson. Against this interlocutor a representation was lodged, in name both of the original pursuer, and of Henderson the country agent, who contended that even if the interlocutor were well founded as to the pursuer, he had a jus quesitum to the expenses found due in the Sheriff Court, which could not be affected either by the new plea of improbation, or by Williamson's disclamation; and he also produced a letter signed by the pursuer, of the same date with the disclamation, averring that the pursuer had actually given authority to raise the action, and that he had signed the disclamation without knowing its contents. This representation having been advised, with answers, by Lord Mackenzie, he altered Lord Pitmilley's interlocutor, and found 'that the declaration of the pursuer does not afford sufficient ground for holding the bill not to be probative or valid.' His Lordship stated in a note, as the grounds of his decision, 'that as the pursuer declares that he signed the bill for John Williamson the drawer, in his presence, and by his desire, and as it does not appear that John Williamson denies this to be the fact, or that it was not the fact, there is nothing to show that the bill was not good as against and in favour of the drawer; and that being the case, it does not appear why it should not be good as against Jackson the acceptor.'—As to the plea of disclamation, his Lordship considered it 'to be repelled by the interlocutor of Lord Pitmilley admitting improbation, and appointing the pursuer to appear and abide by the bill—an interlocutor never represented against, and which cannot now be disturbed. Whatever effect may now be given to the general doctrine as to the effect of improbation pleaded by the pursuer, at least it seems quite clear that an interlocutor admitting improbation by a defender implies that the action is not disclaimed or discharged by the pursuer.' Mrs. Jackson reclaimed against this interlocutor, and contended, 1. That the disclamation was conclusive against the pursuer, and likewise against Henderson the agent, who was thus established to have

raised the action originally without authority; and that this plea was not barred by her having proponed improbation, under the rule *exceptio falsi est ultima omnium*, which only applied to objections to the title.—2. That as the summons libelled on a bill stated to have been made and indorsed by old Williamson, it could not warrant a decree on a bill subscribed by procuration, that fact not being set forth.—3. That the bill itself was improbativ, and could not even have afforded ground of action against old Williamson, there being no evidence of his being in use to sign by procuration of his nephew, and still less could it do so against a co-acceptor;—and, 4. That the possession of the bill, merely marked ‘paid’ on the back, was no evidence that it had been retired by Williamson junior.

The Court ‘having considered the terms of the original summons, the declaration of the pursuer John Williamson junior, ‘when called on to declare whether he meant to abide by the bill ‘founded on, and whole circumstances,’ unanimously altered Lord Mackenzie’s interlocutor, assoilzied Mrs. Jackson, and found the pursuer and Henderson liable in the expenses both in this and in the Inferior Court.

**LORD GLENLEE.**—Where a party is called on to abide by a document, if he abides with a qualification, the Judge may find that the qualification amounts to a not abiding, and may then decern accordingly. He cannot, however, take for granted the statements in the declaration against the party proponing improbation. Even if Lord Pitmilley’s interlocutor were wrong, which it is not, the only thing which Lord Mackenzie could properly have done was to find the abiding sufficient, and appoint articles approbatory and improbatory; but it was incompetent for him to hold the declaration sufficient proof of what was there stated, as to old Williamson’s being in use to sign by procuration. Lord Pitmilley’s interlocutor, however, is the proper one. The summons libels the bill, not as signed by procuration, but as subscribed by old Williamson himself; and as it appears that this was not the case, whatever claims may lie in another form of action, the present one must be dismissed.

**LORD ALLOWAY.**—I concur in Lord Glenlee’s observations; but there are other important considerations to be attended to. The interlocutors of the Sheriff are fundamentally wrong in point of law. He proceeds on the ground that possession of the bill by the pursuers’ agent inferred sufficient authority for raising this action. There never was a more erroneous judgment. The bill being marked paid shows that it was retired by the true debtor, and the possession affords no ground of presumption that it was retired by

Williamson alone ;—the presumption is completely the other way. Then as to the disclamation, I am convinced that it was a sound one, and cannot be affected by the subsequent proceedings.

LORD JUSTICE-CLERK concurred, and further observed—The bill is attempted to be sustained by reference to English authorities, where parties have been held bound by bills signed by procuration, in consequence of long previous practice of signing bills in that way. But here there is no such allegation, and no evidence except a letter, to which no credit can be given ; and on the grounds of law already stated, the interlocutor must be altered.

LORD PITMILLY.—Every thing in the case tends to confirm my original opinion formed in the Outer-House.

*Advocators' Authorities.*—(1.)—Forrester, July 8. 1697, (12061.)—(2.)—Lord Chancellor in Davidson v. Robertson, (3. Dow, 280) ; A. v. Harrison, (12. Mad. 346.)—(4.)—Campbell, Dec. 7. 1728, (11434) ; Webster, Jan. 15. 1819, (F. C.)

*Respondents' Authorities.*—(1.)—2. Bell, 101 ; 4. Stair, 41. 39 ; Oliphant, March 20. 1573, (1204) ; Peacock, July 3. 1662, (12140.)—(3.)—2. Bell, 68 ; Davidson v. Robertson, (3. Dow, 280. 218) ; Chitty, 25. 34. and cases there quoted ; Neill v. Ewing, 1. Esp. 61 ; Wilkes v. Black, 2. Esp. 14 ; Bayley, 32. 3.

A. FLEMING, W. S.—MACK and WOTHERSPOON, W. S.—Agents.

No. 215.

J. MACARA, W. S. Pursuer.—*Morre.*

J. PHILLIPS, Defender.—*Tavase.*

*Law Agent.*—Held,—1.—That under general instructions to recover payment of a debt, the agent is entitled to use a sound discretion in executing not only personal, but other diligences which circumstances may render advisable ;—and,—2.—That a country agent, having employed an agent in Edinburgh, is not freed from liability by ceasing to act as agent, in order that he may be a witness in the cause.

Dec. 9. 1825.

2d DIVISION,  
Lord Cringletie.  
M'K.

In an action at the instance of Macara, W. S. against Phillips, a writer in Crieff, who was likewise partner in a distillery concern with one M'Cowan, now bankrupt, for payment of certain business accounts, Phillips objected to several items of the charge against him, and in particular to the expense of doing diligence against one Veitch, and of defending an action raised against his partner M'Cowan. As to the first of these charges, it appeared that the company had transmitted to Macara a bill granted by Veitch, with general instructions to recover payment ; in virtue of which Macara had imprisoned Veitch, executed poindings and arrestments of certain moveables and debts, and also prepared a disposition omnium bonorum to be signed by Veitch in a process of aliment under the Act of Grace ; and to his claim for the ex-

pense of these proceedings it was objected, that under his instructions Macara had no right to do more than execute personal diligence against Veitch. In regard to the other article, being the expense of defending an action raised against M'Cowan, Phillips, who acted as his partner's country agent, had, immediately after the summons was served, written to Macara in these terms:— 'You will likely, in the course of the week, see our P. M'Cowan, who this night went for Old Reekie, and who I have instructed to deliver you a summons of reduction, &c. served upon him, that if it shall be called, you may make appearance for him. I at the same time desired him to inform you, that betwixt and the day of calling I will furnish you with a memorial upon the subject, to enable you to prepare defences in due time.' M'Cowan accordingly delivered the summons to Macara, and Phillips forwarded the requisite information for entering defences; but shortly thereafter he was advised that he should cease to be agent, as his evidence might be necessary in the cause; and he now contended that his letter did not import any employment of Macara on his part, so as to infer his liability, or at least that it should terminate from the period when he ceased to act as agent. The Lord Ordinary repelled the objections, and the Court adhered.

The Court concurred in the opinion of the Lord Ordinary, stated in a note, that, as to the first objection, the documents of debt being put into the pursuer's hands for the purpose of recovering payment, and there being no evidence of any limitation as to the mode of doing so, he was entitled to use his discretion, and that, in what he did, there had been no excess; and as to the second item, their Lordships were likewise agreed that the principle of the case of Greig directly applied.

*Purner's Authority.*—Greig, June 18. 1811, (F. C.)

J. MACARA, W. S.—D. GRAY,—Agents.

W. M'MILLAN, Complainer.—*Jeffrey—Donald.*  
A. HAMILTON, Respondent.—*Cockburn—M'Neill.*

No. 216.

*Public Officer.—Baron Bailie.*—A complaint against a baron bailie, for receiving payment of expenses awarded by him, sustained, and expenses found due.

HAMILTON, the agent of a gentleman who had a right of barony, was appointed his baron bailie; and in 1822 a petition was presented to him by the baron, stating that M'Millan, one of his

Dec. 10. 1825.

1st DIVISION.  
S.

tenants, had committed a trespass, by making use of a road to which he had no right. Hamilton pronounced a judgment, prohibiting M'Millan 'from occupying the said road, or destroying the barriers which the petitioner may think it necessary to erect for the preservation of his property on the line of path in question, in respect that the defender does not allege he has any prescriptive or written title to the road in question;' and found him liable in £1:2:6 of expenses. Two years and a half thereafter a petition and complaint was presented by M'Millan, stating that the petition which had been addressed to Hamilton had been drawn by himself, or by one of his clerks, in consequence of information received from the baron, and was accordingly signed by his own clerk; and that the expenses had been paid to Hamilton himself. He therefore contended, that as he had acted in the capacity both of judge, agent, and clerk, he had been guilty of malversation in office;—that he ought to be suspended, subjected in fine, and found liable in expenses. To this it was answered, that the complaint was a malicious proceeding, resorted to by a country writer in Hamilton's neighbourhood;—that the justice of the decision had been acquiesced in, and that it was the invariable practice in Baron Courts for the agent of the baron to act as bailie;—that the bailie usually appointed one of his own clerks to officiate as clerk of court, to whom a salary was paid;—and that although the expenses were in the first place payable to the bailie, yet in reality they went to the clerk so appointed. He accordingly admitted that such was the course which had been followed in this case; and it appeared from his books that the expenses were either charged against the baron, or that credit was given for them when recovered from the party. The Court sustained the complaint, found that the conduct of Hamilton was irregular, and subjected him in expenses.

**LORD PRESIDENT.**—We all know that it is the practice for the agent of the baron to act as his bailie, and the only relevant part of the complaint is, that the fees or expenses were paid to him; and as it appears that such was the case, we must sustain the complaint.

**LORD BALGRAY.**—There has been no moral wrong committed here; but the complainer has laid hold of an inaccuracy on the part of Hamilton, which we must correct. It will therefore be sufficient to sustain the complaint, and find expenses due.

**LORD CRAIGIE.**—The proceedings in such courts ought to be strictly watched, for it appears to me that they are highly inexpedient.

**LORD PRESIDENT.**—The expediency of keeping up the jurisdiction of such courts is a matter of consideration for the Legislature, and not for us.

**LORD GILLIES.**—The Baron Court had no jurisdiction in a question of trespass; and I think that, in the whole circumstances, we should find expenses due as between agent and client.

*Complainer's Authorities.*—A. S. March 6. 1783; Campbell, July 10. 1824, (ante, Vol. III. No. 187); Beller, Feb. 11. 1849, (F. C.); Adam, July 5. 1824, (No. 119. Cases in Q. of Just.)

**J. GEMMEL, — J. BOWIE, W. S. — Agents.**

**J. ERSTON, Complainer. — Jeffrey — Donald.**  
**A. HAMILTON, Respondent. — Cockburn — McNeill.**

No. 217.

*Public Officer. — Baron Bailie.*—A complaint against a baron bailie, for receiving payment of expenses which he had awarded, sustained, and expenses found due.

THIS case was precisely similar to the preceding one, with the exception that Erston further alleged that Hamilton, who was a Justice of Peace Clerk-depute, had drawn a complaint against him to the Justices, acting, not under the Small Debt Act, but under their ordinary jurisdiction, and that he had conducted the process as agent. In answer to this, Hamilton denied that he had acted as agent, and stated that it was his proper duty, as clerk, to draw the complaint. The Court, without distinguishing between the proceedings before the Baron Court and those in the Justice of Peace Court, sustained the complaint generally, and found expenses due.

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S.

The Court were in general of opinion, that the clerk might competently draw the original complaint to the Justices in cases such as this; but that he was not entitled to act as agent in the cause. They did not, however, state whether they sustained the complaint against Hamilton as baron bailie, or as Justice of Peace Clerk-depute.

**J. GEMMEL, — J. BOWIE, W. S. — Agents.**

**R. LOWE, Suspender. — Cuninghame — D. Macfurlane.**  
**P. CAMPBELL, Charger. — Sol.-Gen. Hope — Brownlee.**

No. 218.

*Bill of Exchange — Vitiatio.*—Circumstances in which it was held, that the erasure of receipts on the back of a bill did not form an objection to the bill as a ground of action.

JOHN ALEXANDER accepted a bill drawn by Amelia Clement for £26. 5s., and, after it was due, she indorsed it to Campbell. An action, founding on this bill, was brought by Campbell against Alexander before the Sheriff of Kinross-shire; and in defence Alexander alleged that, before the bill was indorsed, he had

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1st DIVISION.  
Lord Meadowbank.  
H.

paid £5 to Miss Clement,—that he had ordered his agent to pay the further sum of £6, which he had done,—and that she had received a further payment from his agent, but the amount of which he did not specify. These two payments of £5 and £6 had been marked on the back of the bill, and Campbell stated that they had been made by him to Miss Clement as advances on the credit of the bill, and that when he paid to her the full sum, and got the indorsation, these receipts had been deleted. The Sheriff pronounced an interim decree for £15. 5s., and ordered a proof as to the partial payments having been made by Alexander. On this interim decree a charge was given; and Alexander having brought a suspension, (in which Lowe was his cautioner,) and having afterwards died, Lowe sisted himself as a party for his interest. He then contended, that as there had been receipts for payments on the back of the bill, by which the sum in it was either diminished or entirely extinguished, and as they formed a material part of the document, and had been vitiated and erased, no action could be founded on such a bill. To this it was answered, 1. That the original defender Alexander did not allege that he himself had paid more than £5, and that the case was still in dependence before the Sheriff, both as to this payment and as to that of £6, which he had stated had been made by his agent;—that there was therefore an admitted balance, and that it was for this balance that decree had been pronounced; and, 2. That it was not pretended that any part of the bill itself was vitiated, and that the allegation merely was, that certain receipts on the back of it had been deleted;—that these receipts were distinguishable from the bill itself, and could not affect its validity as a ground of action;—and that, accordingly, not only ordinary actions, but summary diligence, were daily raised, without objection, on bills where the names of indorsers were scored, although their indorsations formed part of the bill. The Lord Ordinary repelled the reasons of suspension; and the Court, in the special circumstances of the case, adhered.

**LORD BALGRAY.**—Taking the whole circumstances, and the judicial statements of Alexander, (which are equivalent to the oath of party,) into consideration, and seeing that he necessarily admits a balance to be due, I am of opinion that the interlocutor ought to be adhered to.

**LORD GILLIES.**—I am also of opinion that there is a balance due, and that the justice of the case is with the charger; but it is an important question in law, whether we can sustain action on such a document. A bill is an unum quid, and in a legal point of view we cannot distinguish the back part of it from the front. But the





case, that a party grants a bill at one day's sight for £2000, and on being presented to him, he pays £1000, and that this is marked upon the back;—has not this the effect to reduce the amount of the bill to £1000? But if that receipt be expunged, then the bill is again brought to its original sum, when, in fact, the amount truly due is only £1000. I concur entirely in the doctrine laid down by Lord Chief Justice Eyre in the case of *Masters v. Miller*; and as it has regulated almost all the decisions on this point, I think it of importance to bring it particularly under the notice of your Lordships.—‘Bills of exchange, (he observes,) as well as other written instruments, the form of which gives them any legal effect, must be preserved with the utmost caution, free from every circumstance of suspicion; and those instruments which are in their nature negotiable, and pass from hand to hand, require greater nicety and circumspection than bonds, which are confined to the custody of one person. On bills of exchange dates and sums may often be altered very materially; and the person who makes the alteration has a probable chance of escaping detection among the number of those who are liable to suspicion. If an unsuccessful attempt to gain by an alteration only puts the party in the same situation in which he would at first have stood, attempts of this kind would be safe and frequent. It is necessary for the protection of commerce, and to secure the credit of paper money, that the danger of losing the real demand upon it be held up, to deter from any attempts to add to the value of a bill.’—This doctrine appears to me to be directly applicable to the present case; and although a balance is no doubt admitted to be due, it is of importance to consider whether we can sustain action on this document.

**LORD PRESIDENT.**—This case is of a special nature. There is a balance unquestionably due; and there seems to be sufficient evidence that the markings of payment were made, not in extinction of the bill, but as value advanced by the charger Campbell. In such a case, or where there is a mistake, there can be no room for the plea now urged. If, for example, an obligant in a bill pays me a certain sum to account, and I by mistake put a receipt on the back of the bill for a larger sum, am I not entitled to correct that mistake? I apprehend that I am; and if so, that is just the case which is before us. We may, however, qualify the interlocutor by adhering, in respect of the admission of the party, and the special circumstances of the case.

The other Judges having concurred in this ground of decision, judgment was pronounced accordingly.

*Suspender's Authorities.*—4. Stair, 42. 19; Hall's Reports, p. 25; *Masters v. Miller*, 1. Anstr. 225; Chitty on Bills, 150; Brown, Nov. 26. 1810, (F. C.); Callender;

Dec. 12, 1812, (F. C.); Macara, June 8, 1823, (ante, Vol. III. No. 342); Thomson on Bills, 384, 602.

*Charger's Authorities*.—3. Ersk. 2. 31; Burnett, Feb. 12, 1778, (1519); Lambton, Jan. 21, 1799, (No. 8. Ap. Bill of E.); Fairholmes, Jan. 7, 1752, (1474); Cochrane, July 20, 1709, (12714); 2 Camp. 439; Chitty, 131; 15 East, 17; Thomson, 205, 206, 209, 429.

GREIG and PEDDIE, W. S.—TOD and WRIGHT, W. S.—Agents.

No. 219.

R. WALKER, Complainer.—*Cockburn—Rutherford.*

A. WISHART, Respondent.—*D. of F. Cranstown—Robertson.*

*Interdict*.—Circumstances in which it was held, that although a party who was accused of breach of interdict could not be found guilty of that offence, yet the complaint against him was justifiable and necessary, and therefore expenses were found due.

Dec. 10, 1825.

1st DIVISION.

D.

WALKER, alleging that he had a right of servitude non edificandi over a certain area of ground, and altius non tollendi in relation to another part of a property belonging to Wishart, and that, notwithstanding, Wishart had begun to build on the area, and was erecting houses on the other part to a greater height than he was entitled to do, presented a bill of suspension and interdict. The prayer of the bill was, 'to prohibit and discharge the respondent and all others from proceeding with the erection, on the premises above mentioned, of the building said to have been sanctioned by the decree or warrant of the Dean of Guild, or any other buildings of a similar description.' The Lord Ordinary having passed the bill, and granted the interdict generally, Wishart presented a petition to the Court, in the body of which the distinction as to the two grounds of complaint was drawn; but the prayer was merely to remit to the Lord Ordinary 'with instructions to refuse the bill of suspension, and to recall the interdict; and to find the petitioner (Wishart) entitled to expenses.' The Court, on advising it with answers, recalled the interlocutor of the Lord Ordinary reclaimed against, in so far as regards the height or elevation of the building in question; and remit to his Lordship to refuse the bill of suspension, and to recall the interdict relative thereto; but, quoad ultra, refuse the desire of the petition, and adhere to the interlocutor reclaimed against.' Lord Medwyn then pronounced this interlocutor:—'The Lord Ordinary, in terms of the remit from the First Division, refuses the bill, and recalls the interdict.' Wishart immediately began to build on the area, and Walker presented a petition and complaint, accusing him of breach of interdict, and also reclaimed against the above judgment. Wishart thereupon ceased to build on the area, and of his consent the Court altered

the interlocutor of the Lord Ordinary, 'in so far as regards the refusing the bill of suspension and interdict in toto, and of new remit to his Lordship to pass the same, and continue the interdict in so far as regards the common area.' In defence against the petition and complaint, he contended, that as the interdict had been recalled entirely, he was entitled to go on with the building. To this it was answered, that the interlocutor of the Lord Ordinary must be held to have been agreeable to that of the Court, and that it was impossible not to perceive from that interlocutor that the recall of the interdict applied only to the height of the buildings. The Court being of opinion that, in the circumstances, they could not find that Wishart had been guilty of a breach of interdict, found, however, that the complaint was justifiable and necessary, and therefore subjected him in expenses.

W. BENNY, W. S.—A. ROBERTSON, W. S.—Agents.

TRUSTEES of the GLASGOW and CARLISLE ROAD, Suspenders.— No. 220.  
*Cockburn—McNeill.*

T. WHYTE, Respondent.—*D. of F. Cramstoun—D. Macfarlane.*

*Road.*—Unwarranted obstructions placed by trustees to shut up a public road may be removed *brevi manu* by parties having interest, if done *de recenti*, but not after a lapse of time.

PRIOR to the formation of the new road from Glasgow to Carlisle, the communication from Lesmahago to Strathaven was by a direct line, which was originally entirely a parish road, but part of which had been assumed as turnpike under an act for the old Carlisle road, continuing, however, to be partially maintained out of the statute labour funds. On this part the trustees had erected a toll-bar, which was removed in 1820, in consequence of the repeal in the new act of the statute empowering the trustees to assume it as turnpike, and a corresponding toll-bar was erected on the new road, which ran nearly parallel to the old one. Across this old road the trustees, in 1822, erected a barrier at the place where the toll-bar formerly stood, which compelled all persons going from Lesmahago to Strathaven to strike off at this point by a cross road into the new road, along which they were obliged to proceed till they passed the toll-bar, where another cross branch conducted them back to the Strathaven road. This proceeding on the part of the trustees was not challenged, as, in consequence of the distance from the point where the cross road entered the new line to the toll-bar not being two hundred yards, the trus-

Dec. 10. 1825.

2d DIVISION.  
Bill-Chamber.  
Lord Medwyn.  
F.

tees were not entitled to levy tolls from persons going this way from Lesmahago to Strathaven. In November last, however, the trustees having opened a new communication between the two roads, at a greater distance from the toll-bar, built a wall across the old road, at the point where this new communication struck off from it, thus compelling passengers to travel along the new road more than 200 yards, and to pay toll at their bar. Immediately after this wall was erected, Whyte, who resided near Lesmahago, caused it to be pulled down *brevi manu*, and also removed the other barrier erected in 1822. The trustees rebuilt it, and presented a bill of suspension and interdict against Whyte demolishing the wall, or removing the barrier. The Lord Ordinary having passed the bill, but refused the interdict, they reclaimed by note, and contended, that whether or not they were legally entitled to shut up the road, Whyte had no right to remove the obstructions *brevi manu*, and without order of law. The Court altered the Lord Ordinary's interlocutor so far as to grant the interdict in regard to the barrier erected in 1822, but refused the note in so far as related to the wall recently erected.

Their Lordships were of opinion, that where any obstruction contrary to law has been erected *de recenti*, parties interested are entitled to remove it at their own hand.

J. G. HOPKIRK, W. S.—J. C. WILSON, W. S.—Agents.

No. 221.

J. NAPIER, Advocate.—*Christison*.

T. KISSOCK, Respondent.—*Maitland*.

*Landlord's Hypothec*.—Circumstances in which it was held, that certain horses reared and worked on a farm, and which were claimed as the property of the son of the tenant, living in family with the tenant, were liable to the landlord's hypothec.

Dec. 12. 1825.

1st Division.  
Lord Eldon.

H.

NAPIER, the proprietor of the farm of Meikle Dryburgh, of which John Kissock was the tenant, sequestrated his effects, towards the end of 1823, for an arrear of rent; and under the sequestration there were included two horses, which were claimed by the respondent Thomas Kissock, who was the son of the tenant, and resided in family with him. In support of this claim he presented a petition to the Steward of Kirkcudbright, stating that although he had no funds, and lived in family with his father, he had borrowed the price of the horses from an elder brother; that he had purchased them from Robert Sloan, his brother-in-law, (which he offered to prove by the evidence of Sloan,) and prayed to have them struck out of the sequestration, and delivered to him as his property. From his judicial declar-

ation, and from a proof which was taken, it appeared that six horses were necessary for the cultivation of the farm; that about four years previously his father had sold two of his horses; and that, in place of them, the two horses in question had been bought when young, reared upon the farm, and employed in the daily cultivation of it, and had been fed and stabled like the other horses belonging to the tenant. The Steward-substitute dismissed the petition, in respect 'that the petitioner, while living in family with his father, and assisting him in the labour of Meikle Dryburgh, must be held as transacting for the behoof of the parent in any purchases or sales of the farm; and that he cannot require and hold a distinct property in such stock kept latent from and to the prejudice of the landlord, as attempted in this case; and that the two horses in question have been for between three and four years part of the stock of said farm.' This interlocutor was altered by the Steward-depute, and the prayer of the petition granted, 'in respect the respondent John Napier, Esq. has not brought forward any evidence to show that the horses in question were the property of John Kissock, nor the produce of the farm.'

Napier having brought an advocacy, and Kissock having contended that he was entitled to examine his brother-in-law Sloan, the Lord Ordinary, 'in respect of a penuria testium, found it competent for the respondent (Kissock) to adduce and examine Robert Sloan.' Against this judgment Napier reclaimed, and contended, 1. That Sloan was an incompetent witness; and, 2. That, in the circumstances of this case, he had a right of hypothec over the horses. The Court unanimously altered, advocated the cause, and dismissed the original petition.

**LORD PRESIDENT.**—It is admitted that the farm required six horses for its cultivation. The tenant sells two of them, and other two are brought to the farm, and there worked for three or four years like the other horses. The landlord was entitled to rely on all these horses being the property of the tenant; and, in a question with him, he is entitled to attach them in virtue of his hypothec.

**LORD BALGRAY.**—In addition to these circumstances, it will also be observed, that the horses were reared upon the farm.

In these opinions the other Judges concurred.

*Advocator's Authorities.*—Cowan, Jan. 31. 1804; Wanshope, Nov. 30. 1805, (not rep.); Stewart, May 31. 1814, (F. C.); Wilkie, Dec. 17. 1813, (F. C.)  
*Respondent's Authorities.*—2. Ersk. 6. 63; Mackie, Dec. 4. 1780, (6214.)

R. RUTHERFORD, W. S.—A. BLAIR, W. S.—Agents.

No. 222.

Sir B. HENDERSON and Others.—*Jardine*.Lady JANE STUART.—*Melville*.

Competing.

*Legacy*.—A party having, in a trust-deed of settlement, bequeathed to his trustees £500 each as a mark of his friendship, and the further sum of £105 to purchase a hogshead of claret as a recompense for their trouble in the management of his affairs, and as a further mark of his affection, and one of the trustees having declined to act—Held that the £500 were due to him and his representative.

Dec. 13. 1825.

1st DIVISION.  
Lord Meadow-  
bank.  
B.

THE late Mr. Anstruther executed a trust-disposition and deed of settlement in favour of Sir Robert Henderson, the late Sir John Stuart, and others, and of the survivors or survivor, 'as trustees for executing the trust hereby created.' After making various provisions and legacies to other parties, which he ordered to be paid by his trustees, he introduced this clause:—'Seventhly, 'My said trustees are hereby requested to accept, each of them, 'of a sum of £500 sterling as a mark of my friendship for them, 'and the further sum of £105 sterling each to purchase for each 'of them a hogshead of claret, as a recompense for their trouble 'in the management of my affairs, and as a further testimony of 'my affection for them; the said legacies to be paid by my said 'trustees, including the legacies and sums left to themselves respectively, at the first term of Whitsunday or Martinmas after 'my death, and to bear interest thereafter during the non-payment.' Sir John Stuart survived Mr. Anstruther, but declined to act as a trustee; and on his death, his representative, Lady Jane Stuart, claimed the legacy of £500, but admitted that she was not entitled to the 100 guineas. This claim having been disputed by the other trustees, and a multiplepounding having been brought, they contended, 1. That as the legacy had been bequeathed, not to Sir John Stuart personally, but generally to 'his said trustees,'—and as Sir John confessedly had never acted in that capacity, nor assumed the character of trustee, neither he nor his representative could maintain that he fell within the description of the persons to whom the legacy had been made; and, 2. That as it was admitted there was no valid claim for the 100 guineas, which was given on the supposition that the parties were to act as trustees, it was impossible to draw any distinction between it and the other legacy. To this it was answered, that the two legacies were bequeathed on separate and independent grounds, the one being given as a mark of friendship, and the other as a recompense for their trouble in the management of the testator's affairs;—that the parties for whom the testator had that friend-

ship were named in the deed, and that they were all included under the general term 'trustees;' and it was the obvious intention of the testator, that even although they should not qualify themselves so as to have right to the recompense, yet that they were to receive the £500 as a mark of his friendship. The Lord Ordinary sustained the 'legacy of £500 sterling left to the deceased Sir John Stuart, Baronet, and found that the legacy left 'to him has not lapsed by his refusal to accept of the office of 'trustee;' and to this interlocutor the Court, by a majority, adhered.

**LORD HERMAND** was of opinion that the legacy was not due.

**LORD CRAIGIE.**—Unless we are to hold that the acceptance of the office of trustee is a condition of the legacy, it must be due. But there is a marked contrast between the legacy of £500 and the hoghead of claret. The one is given as a legacy, and as a mark of friendship, while the other is bestowed as a recompense for acting in the capacity of trustee. The condition therefore applies to the recompense, and not to the legacy.

**LORD PRESIDENT.**—There are here two different legacies bequeathed, from two different motives. The one is given to the trustees as personal friends of the testator, and the other for their trouble in the management of his affairs. If he had intended that both should depend on their acting as his trustees, the testator would never have made the distinction which he has done.—I am of opinion, therefore, that the legacy is due.

**LORD GILLIES.**—I cannot concur in that opinion; and it appears to me, that the English cases which have been quoted throw a great deal of light on this point. These decisions are deserving of our attention, because the law of both countries must be the same,—the object of both being to give effect to the will of the testator. In a case precisely similar, the Master of the Rolls stated, that 'nothing is so clear as, that if a legacy be given to a man as executor, whether expressed to be for care or pains, or not, he must, 'in order to entitle himself to the legacy, clothe himself with the 'character of executor. If there be any circumstance to show he 'was backward in undertaking the trust reposed in him, he shall 'not have it.' But here the legacy was left to Sir John Stuart as a trustee, and he never clothed himself with that character. It is true that two legacies are bequeathed, the one being for friendship, and the other for trouble; but it was held by the Master of the Rolls, that even in such a case the legacy would not be due. Suppose that a man, while on deathbed, leaves a legacy to a person whom he describes as his nephew-in-law, on the idea that he is to marry his niece, and that the person declines to marry

the niece, and so never acquires the description of nephew-in-law ; —could he, notwithstanding, insist on payment of the legacy, and rest his claim on the ground that the testator had said that he had left it as a mark of his friendship ? I apprehend he could not ; and if so, there seems no distinction between that case and the present one.

LORD BALGRAY.—I am of the same opinion as the Lords President and Craigie ; and in addition it may be observed, that the testator, after bequeathing the £500, states that he wished his trustees to accept ' of the *further* sum of £105 sterling ' as a recompense for their trouble ;—thereby making such a distinction as rendered his intention perfectly clear.

*Trustees' Authorities*.—Scrimgeour, Feb. 2. 1675, (6361) ; Leckie, Dec. 7. 1748, (6349, and Elch. No. 16. Leg.) ; L. Roper, 335. and Cases there.

J. HERRIOT, W. S.—A. STORIE, W. S.—Agents.

No. 223.

H. ROSE, Pursuer.—*Sol.-Gen. Hope—More.*

D. M'LEOD, Defender.—*Jeffrey—Matheson.*

*Bankrupt*.—Held,—1.—That a debt contracted and payable in Berbice is not discharged by a certificate under an English commission of bankruptcy ; and,—2.—That a reference entered into with the assignees under the commission, to ascertain whether the creditor was not truly debtor to the bankrupt, (but not having in view a claim against the estate,) and a judgment by the arbitrator, did not make the debt English, nor was it equivalent to proving under the commission.

Dec. 13. 1825.

1st Division.  
Lord Meadow-  
bank.  
D.

THE late James Crawford M'Leod and John Bethune were partners in a plantation concern, called New Geanies, in the colony of Berbice ; and the pursuer Rose was a creditor of the company for debts contracted in the colony, and which were secured over the plantation. In 1811 M'Leod came to England, where a commission of bankruptcy was issued against him ; and a dispute having taken place between his assignees and Rose, (the former of whom alleged that, on a correct accounting, it would be found that Rose was indebted to M'Leod,) a reference was made to a Mr. King, a merchant in London, who issued a judgment in the form of a letter, stating that he was of opinion that a certain sum was due to Rose. Rose, however, did not prove his debt against M'Leod's estate, but adopted measures for recovering it in the colony of Berbice, before the Courts of which he obtained a decree, finding him to be a creditor of M'Leod and Bethune for £3833 : 19 : 10 ; and this judgment was affirmed, on appeal, by the King in Council. M'Leod having died, after obtaining a certificate under the commission of bankruptcy discharging him of his debts, Rose brought an action before the



Court of Session against his son and heir, concluding for payment of the above sum. In defence against this action it was pleaded, 1. That as the commission of bankruptcy, like a Scottish sequestration, embraced all the funds of the debtor wherever situated, the certificate or discharge was equally as extensive in relieving the bankrupt of all his debts; and therefore, as the debt sued for had been contracted prior to the date of the commission, it was discharged by the effect of the certificate; 2. That at all events this debt must be held to be an English debt, because, although it was contracted in Berbice, yet, by entering into the reference with the English assignees, and by the judgment which was in consequence pronounced, Rose had as completely made it an English debt, as if he had taken a document for it in that country; and, 3. That this reference and relative judgment were equivalent to proving the debt under the commission of bankruptcy, or at least were sufficient by the law of England to place Rose in the situation of a claimant against the assignees, and so liable to be affected by the certificate. To this it was answered, 1. That it had been settled, both in England and in Scotland, that the certificate or discharge could not affect debts contracted and payable out of their respective jurisdictions; and that as the debt in question had been incurred, and was secured and payable in the colony of Berbice, Rose could not be affected by the certificate which M'Leod had obtained in England; 2. That the reference had been made, not with the view of constituting or making a claim against the assignees, but had been entered into at their suggestion, to ascertain whether Rose was not debtor to the estate, and so liable to account to them; and, 3. That a transaction of that nature was not equivalent to proving or claiming under the commission. The Lord Ordinary found 'that the debt now pursued for, being contracted by Mr. James Crawford M'Leod, deceased, in the colony of Berbice, secured over the plantation of New Geanies, and payable within the said colony, cannot, as originally incurred, be deemed to be an English debt, or liable to the effects of a certificate granted under a commission of bankruptcy issued in England against the said James Crawford M'Leod;—that there are no circumstances condescended upon, sufficient to establish that the pursuer agreed to convert the debt, which was thus originally colonial, into an English debt; and that the said James Crawford M'Leod, and his representative, the present defender, are liable for the amount thereof, notwithstanding the certificate aforesaid;' and appointed the pursuer to give in a precise state of his claim. To this interlocutor the Court, after advising a condescendence and answers,

and certain documents as to 'the nature and course of the proceedings held with respect to the claims in question before the assignees and the arbiter,' adhered, but found no expenses due.

The only difficulty which the Court had was, as to the effect of the proceedings before the arbiter, which at first appeared to them to amount to a constitution of the claim within England. But, on an investigation, a majority of the Judges were satisfied that the reference was merely entered into with the view of satisfying the assignees that they had no claim against Rose, and that it was not intended thereby to constitute his debt, or to make a claim against them.

*Pursuer's Authorities.*—(1.)—1. Cook, B. L. 590; 1. Barn. and Ald. 654; 1. Mon. B. L. 661; 1. East, 6; 2. H. Black. 553; 2. Bell, 692.

*Defender's Authorities.*—(1.)—Strother, July 1. 1803, (Ap. For. Comp.); Dickie, Dec. 20, 1811, (F. C.); R. Bank, Jan. 20. 1812, (F. C.); 1. Rose, 486; 2. Rose, 223. 291; Lastly, Dec. 21. 1809, (F. C.); 1. Buck. 57;—(2.)—2. Rose, 309.

D. HORNE, W. S.—J. GORDON, W. S.—Agents.

No. 224.

W. EWING, Pursuer.—*Sol.-Gen. Hope—A. Connell.*

Earl of STRATHMORE, Defender.—*Moncreiff—Cunninghame.*

*Bill of Exchange—Agent and Client.*—Held that a party sued for payment of acceptances found in his deceased agent's repositories, is not entitled to have the process resisted till the issue of an accounting, on vague allegations of intrusions, &c. admitting in his correspondence that the agent had made great advances on his behalf.—2. That the presumption that bills retired with a general receipt were paid with the funds of the proper obligant, may be redargued by the terms of his own correspondence.

Dec. 12. 1825.

2d DIVISION.  
Lord Mackenzie.  
B.

EWING, as executor-creditor of the late John Buchan, W. S., raised an action against Lord Strathmore for payment of a number of bills accepted by his Lordship, and found in Mr. Buchan's repositories after his death. In defence it was pleaded, that Mr. Buchan had been Lord Strathmore's agent for several years, and had intromitted with funds belonging to him, and that, on an accounting, it would appear that the balance lay in favour of his Lordship. In answer to this plea, there was produced a great deal of correspondence between Lord Strathmore and Mr. Buchan, in which the former uniformly acknowledged the pecuniary obligations under which he lay to Mr. Buchan; and in particular a letter from Mr. Buchan, of date posterior to the bills sued on, stating that his advances had swallowed up his whole property, and complaining that no exertions had been made on his Lordship's part to repay him, and an answer from Lord Strathmore, expressly admitting the great extent of his obligations.

The Lord Ordinary having decreed in terms of the libel, Lord Strathmore petitioned, and contended that, in a question between an agent and his employer, process should at least be sisted till the state of accounts should be settled in an accounting, as was done by the Court in the case of *Hamilton v. Sir John Johnstone's trustees*; and he accordingly raised an action of accounting against the representatives of Mr. Buchan, the summons in which, however, contained only a vague and general allegation of intromissions on Mr. Buchan's part, without any specification of particular funds intromitted with. Besides this general plea, his Lordship objected specially to the bills sued on, 1. That some of them had never been discounted; 2. That some were joint acceptances by Mr. Buchan and Lord Strathmore; 3. That others bore a general receipt of paid, and must therefore be presumed to have been retired by the proper debtor, and consequently to have been paid by Buchan, as his agent, out of his Lordship's funds; and, 4. That others had been originally simply marked, paid, and signed by the banker with whom they had been discounted; but that this marking had been delete, (improperly, as Lord Strathmore alleged must have been the case,) and a special receipt by the banker's agent, written on the bill, bearing it to be retired by Buchan. The Court, however, being satisfied from the correspondence that the several bills had been actually retired by Buchan out of his own funds, and that the joint acceptances were for Lord Strathmore's accommodation, adhered to the Lord Ordinary's interlocutor.

**LORD GLENKELIE.**—There is no analogy between this case and that of *Hamilton v. Johnstone's trustees*. In that case there could be no doubt of the agent's liability to account, as he admitted intromissions; but after he was called in an action of accounting, he assigned one of his grounds of debt to his mother, who, in these circumstances, was held not entitled to force payment pending the accounting. Here, however, there is nothing but Lord Strathmore's general allegation of the existence of grounds of accounting. In regard to the bills sued for here, there is sufficient evidence of their having been retired by Buchan himself, to get the better of the general presumption, that where there is no special receipt, the bill has been retired by the proper obligant.

**LORD ALLOWAY.**—The circumstances in the case of *Hamilton* were totally different from those in the present, where the correspondence of Lord Strathmore constantly admits his obligations to Mr. Buchan. As to the special objections to the bills, they are completely obviated by the correspondence. The first class are those never discounted; and the general principle must hold, that they have not been paid

by the acceptor. The second class, being the joint acceptances, are demonstrated by written evidence to have been for Lord Strathmore's accommodation alone: As to those retired with a general receipt, the ordinary presumption of law must give way to the admissions of Lord Strathmore in his correspondence; and in regard to the last class, it is the common practice for bankers to send round their bills for payment with a general receipt marked on them, which, if not paid, is scored, and the bills are handed over to the agent of the bank, for the purpose of his doing diligence; and his receipt of payment by Buchan is most complete evidence that they were retired by him, and affords no ground for the insinuation of improper conduct made by Lord Strathmore.

LORD JUSTICE-CLERK was of the same opinion; and further observed, that if Lord Strathmore's summons of accounting had condescended on special funds, alleged to have been intromitted with by Mr. Buchan, the case would have been very different; but that it was impossible to delay giving decree in the present action, on account of the vague and general statements made by his Lordship.

*Defender's Authority.*—Hamilton v. Johnstone's Trustees, 1818, (not rep.).

CAMPBELL and MACK, W. S.—JAMES HAMILTON, W. S.—Agents.

No. 225. L. MACKINTOSH and Others, Complainers.—*Bell—Shaw.*  
R. MURRAY, Respondent.—*Cockburn—Matheson.*

*Bankrupt—Trustee.*—Held competent for creditors to complain to the Court that a trustee on a bankrupt estate, had refused to examine a party alleged to have intromitted with it, and to re-examine the bankrupt on matters therewith connected, and to have the trustee ordained to do so.

Dec. 14. 1825.

1st Division.

D.

THE estates of Urquhart having been sequestrated under the bankrupt act, Murray was elected trustee, and M'Andrew, a writer in Inverness, was appointed by him to be agent on the estate. After the statutory examinations, M'Intosh and others addressed a requisition to the trustee, stating that M'Andrew (who had claimed on the estate as a creditor to a large amount) had been for several years the agent of the bankrupt—that he had had extensive intromissions with his effects—that he had obtained his accounts docketed by the bankrupt under peculiar and suspicious circumstances—that the bankrupt disputed the accuracy of these accounts, and therefore requiring the trustee to examine M'Andrew in relation to his intromissions, and also to re-examine the bankrupt on the same subject. The trustee having declined to do so, M'Intosh and others presented a petition and complaint, praying the Court to decern and ordain him forthwith

‘ to take the necessary steps for proceeding with the examination of the bankrupt and of the said John M’Andrew, in all matters connected with the estate, and particularly in relation to the transactions with Mr. M’Andrew, and either to put those questions which shall be suggested by the petitioners or their advisers, or to permit them to do so themselves.’ Against this complaint the trustees objected, 1. That it was not competent for any of the creditors to apply for examination of the bankrupt or others, but that this was alone competent to the trustee, and therefore the complaint ought to be dismissed; 2. That it was not competent to examine M’Andrew on matters which were connected with his duty as agent for the bankrupt; and, 3. That the complainers had already obtained privately from the bankrupt all the information which they wished to have. To this it was answered, 1. That the complaint prayed the Court to ordain the trustee to perform his duty by examining the bankrupt, and others connected with his affairs; and therefore, without inquiring whether or not it would be competent for creditors to apply for an examination where the trustee failed to do so, this complaint was quite competent; 2. That M’Andrew was liable to be examined as a person who had been connected with the affairs of the bankrupt, and particularly as to the nature and extent of his intrusions; and, 3. That they were entitled to have the bankrupt examined, so that the statements made by him might be put upon record, and form the subject of consideration for the creditors at large.

The Court, after appointing the complainers ‘ to give in a note of the interrogatories proposed to be put to each of George Urquhart the bankrupt, and John M’Andrew, sustained the complaint as competent,’ and ordained the ‘ trustee to proceed with the examination of George Urquhart the bankrupt, and of the said John M’Andrew in regard to his connexion with the bankrupt affairs, so far as necessary to discover the bankrupt’s funds, before the Sheriff of Inverness or his substitute, either of whom is authorized to put all questions to the above individuals, or any others who may be brought before him by the trustee, for expiscating the matters in question, in terms of the statute, that shall appear to him to be competent and proper for that purpose; reserving the question of expenses until the issue of said examinations.’

*Complainers’ Authorities.*—(1.)—54. Geo. III. c. 137. § 71; 2 Bell, 422;—(2.)—54. Geo. III. c. 137. § 32; Mackernay, March 1. 1823, (ante, Vol. II. No. 232.)

*Respondents’ Authorities.*—(1.)—2 Bell, 4. 21; 54. Geo. III. c. 137. § 32.

A. MONTGOMERY, W. S.—E. M’BEAN, W. S.—Agents.

been settled with, and another not having attained the requisite age for receiving payment of her provision. On the death of the eldest son, Lieutenant Burrell, the second son, claimed right to them as heir-at-law of his brother; while, on the other hand, the younger children insisted that the reversionary interest in them was moveable, and descended to them as their brother's executors.\* To settle this question, a multiplepinding was brought by the trustees; and, in support of their claim, it was contended by the youngest children,—1. That as it was the evident intention of the truster that his whole estate should be converted into money, the subjects were made moveable destinatione;—2. That accordingly the trustees were expressly ordered to sell the subjects, and that the rights of parties in a question of succession could not be affected by the trustees having either delayed or omitted to perform this part of the trust;—3. That as the trust was still existing, it might still be necessary to convert the subjects into money, and therefore they could not be regarded as heritable; and, 4. That the nature of the claim against the trustees was a mere *jus actionis*, or claim of accounting, which was of a moveable nature. To this it was answered, 1. That a discretionary power was conferred on the trustees to sell or not, as they should see proper; and that so far from their being imperatively ordered to sell, or its being the intention of the truster that they should absolutely convert the heritable subjects into money, he had required them to do so, only in the event that they should consider it proper and eligible; and in case they should think it not so, he appointed them ‘to denude of such part thereof as may then be in their hands, and converted into ‘money,’ in favour of his eldest son.—2. That as the trustees had not made up titles, the property remained in *hereditate jacente* of the truster; that its heritable character could not be affected by a trust being superinduced, and a power of sale being bestowed on trustees; and that, therefore, as the property conveyed was heritable, it retained its original nature, and consequently descended to the heir-at-law.—3. That although the trust was subsisting in point of form, yet there were sufficient means, independent of the heritable subjects, for satisfying all the purposes of it;—and, 4. That even if it were to be held that the right which existed was a *jus actionis*, it was of an heritable nature, and so belonged to the heir-at-law.

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\* Another question was also raised as to the £500 provided to the eldest son; but as the Lord Ordinary and the Court had no difficulty in finding it moveable; and the discussion was confined chiefly to the other points, it is not noticed.

' trustees to pay over the reversion of the proceeds of my said  
 ' whole estates and effects, heritable and moveable, above con-  
 ' veyed to them, or to denude of such part thereof as may then  
 ' be in their hands unconverted into money, to and in favour of  
 ' William George Burrell, my eldest son, (but not in any event  
 ' till he has attained the age of twenty-five years complete,) and  
 ' his heirs and successors whomsoever, to whom I hereby devise  
 ' and provide the reversionary interest in my said whole estate  
 ' and effects, and this over and above the estate of Lynetoun, already  
 ' vested in my said son, and heritable bonds belonging to me, af-  
 ' fecting the same; and in the mean time, and until the reversion  
 ' of my said estate shall be paid or made over to my said son, I  
 ' authorize and empower my said trustees to pay to him such  
 ' sum or sums of money as they my said trustees may think proper,  
 ' or can conveniently spare from the proceeds of my said estate.  
 ' But in any event I provide and declare that my said son, Wil-  
 ' liam George, shall be entitled, when he arrives at the said age of  
 ' twenty-five years complete, to demand, and my said trustee  
 ' shall be accordingly obliged, to pay to him and his foresaids  
 ' the sum of £500 sterling, with the legal interest thereof from  
 ' that term till payment, and a fifth part more of liquidate penalty  
 ' in case of failure; all which payments shall of course be im-  
 ' puted in payment and satisfaction of the said reversionary in-  
 ' terest. Moreover, I empower my said trustees to denude of  
 ' the reversion of my said estate to the said William George Bur-  
 ' rell and his foresaids, even during the life of my said wife, on  
 ' investing a capital sum, sufficient for the payment of her said  
 ' annuity, on proper heritable security, payable to her in liferent,  
 ' and to the said William George Burrell and his foresaids in fee.  
 ' Lastly, I provide and declare, that in the event of my said eldest  
 ' son William George dying before the said age of twenty-five  
 ' years complete, without leaving lawful issue of his body, the said  
 ' reversion of my estate and effects above provided to him shall  
 ' be divided by my said trustees among my surviving children,  
 ' equally among them, and their heirs and successors per stirpes  
 ' respectively, in such shares and proportions, more or less, as  
 ' shall appear to my said trustees expedient and proper in the cir-  
 ' cumstances.'

The trustees, on the death of Mr. Burrell, entered into posses-  
 sion, and sold off his moveable effects, but did not make up any title  
 to the heritable property. William George Burrell, the eldest  
 son, died unmarried after attaining 25 years of age, and at this  
 time the heritable subjects were unsold; but the trust was still  
 existing, the widow being alive, one of the daughters not having

been settled with, and another not having attained the requisite age for receiving payment of her provision. On the death of the eldest son, Lieutenant Burrell, the second son, claimed right to them as heir-at-law of his brother; while, on the other hand, the younger children insisted that the reversionary interest in them was moveable, and descended to them as their brother's executors.\* To settle this question, a multipointing was brought by the trustees; and, in support of their claim, it was contended by the youngest children,—1. That as it was the evident intention of the truster that his whole estate should be converted into money, the subjects were made moveable destinatione;—2. That accordingly the trustees were expressly ordered to sell the subjects, and that the rights of parties in a question of succession could not be affected by the trustees having either delayed or omitted to perform this part of the trust;—3. That as the trust was still existing, it might still be necessary to convert the subjects into money, and therefore they could not be regarded as heritable; and, 4. That the nature of the claim against the trustees was a mere *jus actionis*, or claim of accounting, which was of a moveable nature. To this it was answered, 1. That a discretionary power was conferred on the trustees to sell or not, as they should see proper; and that so far from their being imperatively ordered to sell, or its being the intention of the truster that they should absolutely convert the heritable subjects into money, he had required them to do so, only in the event that they should consider it proper and eligible; and in case they should think it not so, he appointed them 'to denude of such part thereof as may then be in their hands, and converted into money,' in favour of his eldest son.—2. That as the trustees had not made up titles, the property remained in *hereditate jacente* of the truster; that its heritable character could not be affected by a trust being superinduced, and a power of sale being bestowed on trustees; and that, therefore, as the property conveyed was heritable, it retained its original nature, and consequently descended to the heir-at-law.—3. That although the trust was subsisting in point of form, yet there were sufficient means, independent of the heritable subjects, for satisfying all the purposes of it;—and, 4. That even if it were to be held that the right which existed was a *jus actionis*, it was of an heritable nature, and so belonged to the heir-at-law.

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\* Another question was also raised as to the £500 provided to the eldest son; but as the Lord Ordinary and the Court had no difficulty in finding it moveable, and the discussion was confined chiefly to the other points, it is not noticed.



The Lord Ordinary preferred Lieutenant Burrell, in respect that, by the terms of the disposition and settlement of the deceased William Burrell, the raisers of the multiplepointing were empowered to convert the whole of the real estate of the testator into money, for the special purposes therein enumerated, and thereafter to convey the residue to the now deceased William George Burrell on his attaining the age of 25 years complete, his heirs and successors; but that if the said power of sale was not exercised to the extent of converting into money the whole of the said heritable estate, it was incumbent upon the said trustees to denude of such parts thereof as should be remaining unsold, to and in favour of William George Burrell, as aforesaid; and that failing the said trustees making payment of the said residue, and denuding of whatever part should remain vested in their persons when the said William George Burrell should arrive at 25 years complete, and the other purposes of the trust were discharged in manner therein provided for, a right was vested in the said William George Burrell to require the said trustees to make payment of the said residue, and denude in his favour of the parts of the heritable property remaining undisposed of in their hands: That, from the special terms of the disposition in favour of the said trustees, the legal character of the right of the said William George Burrell to the reversion of his father's succession was virtually made to depend upon the extent to which the discretionary powers conferred on them should be exercised, and that the same is to be deemed a right to moveables descendible to executors, in so far as the real estate was converted into money; but heritable, and to be taken up by his heir-at-law, in so far as concerned those parts thereof which remained in the hands of the trustees at the expiry of the trust; and that the subject in dispute being vested in heritable estate, the right to require the trustees to denude thereof has been duly taken up by the claimant Ferguson Burrell, heir-at-law of the deceased William George Burrell.' And his Lordship subjoined the following note:—The Lord Ordinary apprehends that this case must be decided in the same way as if the trustees had actually denuded of those parts of William Burrell's heritable estate which remained unsold after the other objects of the trust were accomplished, and had therefore been retained by them in the same state in which they had received them; and in that case, it is clear, there could have been no doubt that the subjects would have belonged to his heir, and not to his executors.' The younger children having reclaimed, the Court altered, and found

‘that the reversionary interest in the estate is to be considered moveable, and descends to the executors and nearest of kin of the deceased William George Burrell, as his heirs in mobilibus, after the purposes of the trust are fulfilled;’ and remitted to the Lord Ordinary to proceed accordingly. Against this judgment Lieutenant Burrell having reclaimed, the Court altered their judgment, and found ‘that the heritable subjects which were unsold in the hands of the trustees, at the period of William George Burrell’s death, descend to the petitioner, the heir-at-law of the said William George Burrell, after satisfying the purposes of the trust;’ and to this interlocutor *they afterwards*, by a majority, adhered.

On this case the Court were much divided in opinion. When it was first advised, Lords Succoth, Balgray, and Gillies were of opinion, both from the terms of the deed—from the intension of the truster—and from the nature of the claim against the trustees being merely a *jus actionis*, that the right was moveable, and so belonged to the younger children. On the other hand, the Lords President and Hermand held that the intension of the truster was, that the trustees should denude of the heritable subjects which were not converted into money, and therefore that they retained their character of heritable; and that although the claim of the heir against the trustees so to denude might be called a *jus actionis*, yet it was of an heritable nature. At the subsequent advisings the two latter Judges adhered to their opinions, as also did Lords Balgray and Gillies; but Lord Craigie (who had come in place of Lord Succoth) being of opinion that the subjects were to be held as heritable, judgment was pronounced accordingly.

*Lieut. Burrell’s Authorities*.—Donaldson, Feb. 19. 1819, (F. C.); Alexander, Mar. 7. 1822, (ante, Vol. I. No. 433.); Campbell, Jan. 14. 1801, (No. 11, Ap. Adj.); 4 Stair, 7. 3; 4 Stair, 45. 21; Dir. v. Trust. &c.; Durie, Nov. 30. 1791, (4624); Gordon’s Trustees, Dec. 4. 1821, (ante, Vol. I. No. 221.)

*W. H. Burrell, &c.’s Authorities*.—2 Ersk. 2. 14; 2 Stair, 1. 8; 2 Ersk. 18; Gidderman, Feb. 26. 1780, (759); Wilson, May 1. 1809, (F. C.)

J. B. FRANK, — J. B. WATT, — Agents.

**MAGISTRATES OF EDINBURGH, Pursuers.**—*Ferguson—L'Amv.* No. 227.  
**OFFICERS OF STATE, Defenders.**—*L. Adv. Rae—Sol.-Gen. Hope—Alison.*

*Jurisdiction—Process.*—Held competent for the Magistrates of a Royal Burgh to pursue before the Court of Session a declarator of their jurisdiction under a Crown charter.

DOUBTS having arisen as to whether the Magistrates of Edinburgh were entitled, notwithstanding the act 16. Ja. I. c. 16, to exercise an Admiralty jurisdiction, in virtue of a charter of King James VI., ratified in Parliament in 1661, and as to the extent of this jurisdiction, they raised an action, in which they called the Officers of State and the Judge of the High Court of Admiralty, concluding to have their right of jurisdiction declared. The Lord Ordinary having decerned in terms of the libel, chiefly on the ground of the notoriety of the usage, the Officers of State reclaimed; and, besides their pleas on the merits, they contended that the action was incompetent, because it was brought by Judges to have their jurisdiction declared, as to which they could have no proper interest; and that this Court had no jurisdiction to decide in such an action, although they might be entitled to determine it incidentally in a patrimonial question between individual parties. To this it was answered, that in all matters which, like the present, were not imperial, but local, the Court of Session had power to determine, and that this action was brought by the Magistrates of Edinburgh, not as Judges, but as grantees of the Crown, to have the extent of the rights under their charters declared. The Court overruled the objection to the competency, but declined to insert an express finding to that effect in their interlocutor. Their Lordships at the same time recalled the Lord Ordinary's interlocutor, and remitted to him to prepare the case further on the merits.

Dec. 14. 1825.

2d Division.  
 Lord Cuninghame  
 M'K.

**LORD JUSTICE-CLERK.**—The case is not in a fit situation for pronouncing judgment on the merits, as the Lord Ordinary's interlocutor is founded on the assumption of facts which are disputed by the parties. As to the objection to the competency, I doubt if it is brought forward tempestive; but, besides, I do not consider it to be well founded.

**LORD GLENLEE.**—There can be no doubt of the competency of this declarator. Before the abolition of heritable jurisdictions, would it not have been competent for any one having such rights to bring a declarator to have the extent declared, in the event of its being disputed? It is equally so in the present case.

**LORD PITMILLY.**—A declarator, which is the most formal process in the law of Scotland, is the 'very best' way of trying this question; and it is not brought by the Magistrates as Judges, but as a corporation.

**LORD ALLOWAY.**—The competency of this declarator cannot be disputed.

**M'RITCHIES, BAYLEY, and HENDERSON, W.S.—F. WILSON, W.S.—**  
Agents.

**No. 228.**      **Marquis of QUEENSBERRY, Pursuer.—Fullerton.**  
**Duke of QUEENSBERRY'S EXECUTORS, Defenders.—Irvine.**

*Entail—Reparation.*—Held that an action concluding for damages, at the instance of an heir of entail in possession, is competent against the executors of the preceding heir, who possessed in virtue of an unrecorded entail containing prohibitive, irritant, and resolute clauses, and who had violated the prohibitions as to the letting of the lands.

Dec. 15. 1825.

1st DIVISION.  
Lord Meadow-  
bank.

D.

By a deed of entail executed by Charles Duke of Queensberry in 1769, he conveyed the estate of Tinwald and others, under prohibitive, irritant, and resolute clauses, to a certain series of heirs;—and, in particular, subject to the restriction, that: 'it should not be lawful to any of the said heirs to set tacks or rentals of the said lands, or any part thereof, for any longer space than nineteen years, and without any diminution of the rental; and that it shall not be lawful to any of the said heirs to take grassums for any tack or rental to be set by them, but to set the said lands and estate at such reasonable rents as can be got therefor, so that the succeeding heirs may not be hurt or prejudiced by the heir in possession setting the lands at an under value, or taking, by way of grassum, what falls annually to be paid out of the produce of the lands.'

In virtue of this entail, William Duke of Queensberry succeeded to the estate, to which he made up regular titles; but the deed of entail was not recorded. On his death in 1810, he was succeeded by the pursuer, who brought an action against his executors, concluding for damages, on the ground that the late Duke had violated the above condition, and particularly by the mode in which he had let the various farms on the estate, and, among others, that of the Mains of Tinwald. An objection having been taken, that the original lease of that farm was current at the time the action was raised, it was sustained both in this Court and in the House of Lords, 'without prejudice to any action or actions to be hereafter brought on account of this and other leases. After the lease had expired, the pursuer raised a

new action, in which he stated, that ' while the said William Duke of Queensberry was in possession of the estates to which he succeeded under the disposition and deed of tailzie aforesaid, he let the whole or most of the farms upon the estates, not at such reasonable rents as could have been obtained therefor, but, on the contrary, he, with an intent to defraud the succeeding heir, let them at rents far below such reasonable rents; and thus the said Marquis, pursuer, has been hurt and prejudged by the said Duke, while in possession, setting the lands at an under value;' and, in particular, that he had done so by the mode in which he had let the farm of Mains of Tinwald. Various defences were pleaded against this action by the executors; but it was chiefly contended, that as the deed of entail, under which the pursuer had succeeded, contained irritant and resolute clauses declaring that any heir who should contravene the conditions of the tailzie should forfeit his right to the estate, and that the acts and deeds done in contravention should be void and null, these were the only penalties which the deed had annexed to any act of contravention; and as it did not contain any condition or declaration importing that the representatives of any heir who should possess the estate should be liable in damages to a succeeding heir on account of any alleged act of contravention, an action of damages was incompetent. To this it was answered, that although the conditions and restrictions in an entail may be guarded by penalties, yet it did not follow that their penal quality constituted their only true and legal character; because, in relation to the heirs, they are the terms and conditions upon which they are entitled to take the estate, and confer right on the substitutes to make effectual those obligations, according to the principles of the common law, against the parties by whom they may be violated; and besides, the entail, not being recorded, could not be regarded as a perfect entail. The Lord Ordinary having reported the case, the Court unanimously found the ' present action competent,' repelled the defence, and remitted to the Lord Ordinary to proceed accordingly.

*Purser's Authorities.*—Hope's M. Pr. t. 16. § 9. 11. 12; 2 Mack. 490; 2 Stair, 3. 59; 3 Ersk. 8. 28; William, Feb. 26. 1724, (15369); Gordon, Nov. 21. 1753, (10258); L. Strathnaver, Feb. 2. 1728, (15378); Cuning, July 29, 1761, (15518); Sutherland, Feb. 26. 1801, (No. 8. Ap. Tail.); Lockhart, June 11. 1811, (F. C.); E. Breadalbane, June 12. 1812, (F. C.); Hay, Feb. 9. 1753, (15603); E. of Wemyss, Feb. 23, 1815, (F. C.)

WALKER, RICHARDSON, and MELVILLE, W. S.—LAMONT and NEWTON,  
W. S.—Agents.

No. 229.

C. FALCONER and Others, Pursuers.—*Baird*.  
Miss M'ARTHUR and J. WRIGHT, Defenders.—*Macfarlane*.

*Competition*.—A father having bound himself by a contract of marriage to secure certain lands to the heirs of the marriage in fee, and himself in liferent; and having become bankrupt, and it being found that his child had a personal right to the fee—Held that she was entitled to rank *pari passu* with his creditor for the price of the lands, subject to the liferent of her father.

Dec. 16. 1825.

1st Division.

Lord Medwyn.

8.

THIS was a branch of the case noticed ante, Vol. II. No. 604, and Vol. III. No. 322. \* Robert M'Arthur, who was heir apparent to certain lands, obtained a disposition from his father to them. Before he made up titles, he entered into an antenuptial contract with Miss Moncrieff, by which he disposed the property 'to and in favour of himself in liferent, for his liferent use allanarly, and the children or bairns of the marriage equally amongst them, share and share alike, (but under the reservations, powers, and declarations after mentioned,) in fee; whom failing, to his own nearest heirs and assignees whomsoever.' He then reserved power to 'sell the lands, but bound himself to infest and seise himself in liferent for his liferent use allanarly, and the heirs particularly before named in fee,' subject to the reservations therein specified, and obliged himself 'to warrant these presents, with the infestments to follow hereon, to be good, valid, and sufficient.' Sasine was taken accordingly; and M'Arthur having become insolvent, and having executed a trust-deed in favour of Falconer and others for behoof of his creditors, they brought an action of declarator against the defender, the only child of the marriage, (to whom Mr. Wright was appointed tutor ad litem,) to have it found that the fee belonged to M'Arthur. The Court pronounced judgment accordingly, but found 'that a personal right to the fee of the subjects in dispute was established by the contract of marriage in the children of the marriage, and that the defender has a right and claim to that effect along with the other creditors of Robert M'Arthur.' A question then arose as to the extent of her claim as a creditor. By her it was contended,—1. That she was entitled to be ranked *pari passu* with her father's creditors for a sum equal to the value of the estate, and a dividend effecting to that claim set apart for her, subject to her father's liferent;—and, 2. That she had right to draw her proportion of that liferent as a creditor along with the other creditors. On the other hand, it was maintained by Falconer and others, that she was only entitled to claim as a creditor for the price of the lands, after deducting from that price the value of her father's

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\* The defender is there erroneously called Moncrieff instead of M'Arthur.

liferent, and also the expenses of the trust-management and sale of the lands. The Lord Ordinary reported the case, and stated in a note his opinion that the defender, 'being a creditor for the price of the lands contained in the contract of marriage, when these are sold, after paying off all real and preferable debts, (if any,) and expenses of the trust-management, including the sale, she is entitled to rank upon the remainder of the trust-funds as a personal creditor *pari passu* along with the other personal creditors of her father, for a sum equal to the price which might be received for the subjects included in the said contract, after deducting a sum corresponding to the value of her father's life-rent, and to draw dividends along with the other personal creditors accordingly.' The Court found 'that the defender Joanna M'Arthur is entitled to be ranked upon the trust-funds as a personal creditor, *pari passu* along with the other personal creditors of the trustee, for a sum equal to the price to be received for the subjects in question upon a sale thereof, but under the burden of the life-rent of the father, and further remitted to the Lord Ordinary to proceed accordingly.'

FALCONER and JOHNSTON, W. S.—TOD and WRIGHT, W. S. Agents.

J. and A. WALKER, Pursuers.—*Moncreiff—Mora*

No. 230.

J. STEELE, Defender.—*Cockburn—Jameson*.

*Testament—Process—Jury Court.*—A party, having (as ascertained by the verdict of a Jury,) required back her will for the purpose of cancelling it, and being prevented from so doing by unintentional delay to return it—*Held*,—1.—That this affords no relevant ground of reduction;—and,—2.—That the Court, in applying the verdict, are not entitled to take into consideration evidence laid before the Jury, and which does not appear on the face of it.

IN an action at the instance of John and Alexander Walker, as executors of the deceased Margaret Walker, concluding for reduction of a testament in which she had bequeathed £200 to the defender Steele, and which had been left in the custody of Simpson her agent, on the ground that she had required the deed to be delivered up to her for the purpose of cancelling it, but that this had been refused or delayed at the instigation of Steele, the following issue was sent to trial in the Jury Court:—'It being admitted that, on the 28th day of March 1822, the late Margaret Walker signed the disposition and deed of settlement in process, and that the same deed was prepared by John Simpson, writer in Bathgate in the county of Linlithgow, and after signature remained in the custody of the said John Simpson from the 28th day of March till after the death of the said

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Lord Eldon.

B.

‘Margaret Walker, which took place about five days afterwards, viz. on the 3d or 4th of April of the year aforesaid: Whether, after having signed the foresaid deed, the said Margaret Walker did, on the 2d or 3d day of April, require the said John Simpson to deliver back the said deed to her: the said Margaret Walker, that she might cancel and destroy the same? and whether the said John Simpson refused or failed to deliver up the said deed?’ On this issue a verdict was returned, finding ‘that Margaret Walker did require the deed back for the purpose of cancelling the said deed, but that Mr. Simpson did not refuse, or intentionally delay, to deliver up the said deed.’ The cause having returned to this Court to have the verdict applied, the Lord Ordinary reduced in terms of the libel. Against his Lordship’s interlocutor Steele petitioned, and contended that under the verdict there appeared merely an intention to cancel, which could never have the same effect with actual cancellation; and that there was no improper conduct on his part, preventing the delivery of the deed, which could bar him from availing himself of the provisions in his favour. To this it was answered, that as the execution of the purpose to cancel was prevented by the delay, although unintentional, to deliver up the deed, effect ought to be given to the clear will of the deceased. The pursuers further founded on facts alleged by them to have been proved before the Jury; and they contended, that in virtue of section 17th of the 55th Geo. III. c. 42, the Court were entitled, in applying a verdict, to consider the evidence laid before the Jury, as appearing from the notes of the presiding Judge. The Court altered the Lord Ordinary’s interlocutor, and, in respect of the verdict, assoilzied from the conclusions of reduction.

**LORD JUSTICE-CLERK.**—This is a case of great importance, both in regard to the merits, and to the manner in which it has been pleaded for the pursuers; for if parties were permitted, in a motion for applying a verdict, to found on facts not appearing from the verdict itself, the system of Jury trial, instead of proving beneficial, would have a most pernicious tendency. But, under the act of Parliament, there is no ground whatever for holding, that, in applying verdicts, the Court are entitled to receive any statements as to the evidence adduced on the trial; they must confine themselves to the verdict, considered along with the summons, the issues, and the deed under reduction. In regard to the merits, if the Court were to reduce this deed, they would go a length which has never been sanctioned in any former case. If the verdict had found that the deed had been prevented from being returned, by the party founding on it, he, on the principles of the



decision in the case of Buchanan, would not be allowed to take benefit under it; but in this case there was a mere purpose to cancel; and it is impossible to presume, that although the deed had been delivered up, the deceased would not have altered her intention. The case of Sir Hector Munro applies very strongly here, and has established the distinction between a purpose to execute, and actual execution. The purpose not having been carried into effect in this case, it is impossible to adhere to the interlocutor of the Lord Ordinary.

The other Judges concurred.

*Pursuer's Authorities*.—A. Burn's Eccl. Law, 202; Buchanan, Nov. 4. 1704, (15932.)  
*Defender's Authorities*.—Houston, Feb. 18, 1631, (12307); Whiteford, Nov. 3. 1742, (12338); Munro, as reversed in House of Lords, July 3. 1813.

A. SMITH, W.S.—RUSSEL, TOL, and HALL, W.S.—Agents.

G. NAPIER, Pursuer.—*Jeffrey*—G. Napier.

G. DOUGLAS, Defender.—*Matheson*.

No. 231.

*Process*.—Decree having gone against a party in default of obtemperance an interlocutor ordering a production of accounts, repone on payment of expenses since the date of the interlocutor, and producing the accounts &c. within a certain short space.

In an action at Napier's instance against Douglas, the Lord Ordinary, on the 12th May 1824, pronounced an interlocutor, which was allowed to become final, ordaining Douglas to produce certain accounts and vouchers; and on his repeated failure to do so, his Lordship decerned in terms of the libel. Two representations having been refused, Douglas petitioned, and the Court remitted to the Lord Ordinary to repone him on payment of the expenses incurred since the interlocutor of 10th May, and on his producing the documents ordered by that interlocutor by the 25th of January.

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 Lord Mackenzie.  
 F.

G. NAPIER,—T. MEGGET, W. S.—Agents.

J. M'GHIE, Pursuer.—*Skene*—W. Bell.

T. LIESHMAN, Defender.

No. 232.

*Process*.—A remit to discuss reasons of reduction in the reduction-roll of the Outer-House to the Lord Ordinary on the Bills, held sufficient and correct.

M'GHIE raised an action of reduction against Lieshman, and in his petition for a remit to discuss the reasons, he prayed the Court to grant warrant for enrolling the said process of reduction and improbation in the reduction-roll for the Outer-House,

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 S.

‘and to remit to the Lord Ordinary on the Bills to call and hear ‘parties’ procurators on the reasons of reduction,’ &c. The Court granted warrant in the terms prayed for; and the case was then enrolled in the reduction-roll before Lord Medwyn, who, after having heard parties, made avizandum to himself with the process. He then pronounced an interlocutor stating that ‘he is ‘quite prepared to dispose of the case; but finds the petition for ‘a remit so expressed, as to have induced the Court to make an ‘incompetent remit, and therefore recalls the interlocutor pronounced this day, making avizandum to himself; reserving to ‘the petitioner to apply of new for a remit to a Lord Ordinary ‘in the Outer-House in proper form.’ In a note his Lordship observed, that ‘the prayer of the petition is for a remit to the ‘Lord Ordinary on the Bills, and the remit has been granted in ‘the terms prayed for. It is rather a new duty for the Bill-Chamber to dispose of reasons of reduction.’ And thereafter, on considering a representation, and having ‘advised with the ‘Lords of the First Division,’ he adhered, and found M’Ghie liable in expenses. M’Ghie then reclaimed, and contended,—1. That the remit had been made, not to the Bill-Chamber, but to the Outer-House, and the warrant was to enrol in the reduction-roll; and that although by the statute 1. and 2. Geo. IV. c. 38, the remit is ordered to be made to the ‘fifth or junior Lord ‘Ordinary for the time,’ yet that Ordinary is identified with the Lord Ordinary on the Bills by the 53. Geo. III. c. 64, which enacts that the junior Lord Ordinary of the First Division shall in time of Session officiate exclusively as Lord Ordinary on the Bills; and that accordingly similar remits had been made in numerous cases without objection.—2. That it was incompetent for his Lordship to review an interlocutor of the Inner-House;—and, 3. That it was also incompetent to recall his interlocutor making avizandum, without a representation. The Court altered, and found ‘that the remit to the Lord Ordinary was sufficient and ‘correct,’ and remitted to his Lordship to proceed accordingly.

LORD BALGRAY thought the objection came too late, and was, besides, much too nice.

LORD GILLIES observed, that the remit was not to the Bill-Chamber, but to the Outer-House;—that it was the Judge who is the fifth or junior Lord Ordinary, who is appointed to officiate as Lord Ordinary on the Bills; and that therefore they were one and the same.

LORD HERMAND was of the same opinion.

LORD CRAIGIE thought they were bound to adopt the precise words of the statute.

ANDERSON and WHITTAKER, W. S.—C. J. F. QAR, W. S.—Agents.

J. WILSON, Suspender.—*Jameson—Shaw.*

No. 233.

J. and J. MITCHELL, Chargers.—*Maitland.*

*Process.*—Held,—1.—That the rule of the A. S. 14th June 1799, as to presenting a second bill to the next succeeding Ordinary in the Bill-Chamber, is in desuetude;—and,—2.—That a first bill without caution having been passed during vacation on caution, it was competent to present a second bill.

WILSON having been charged on a promissory note payable to him, and alleged to have been indorsed by him to Mitchells, presented a bill of suspension without caution, on the ground that his name had been forged. Lord Gillies, on the 8th of October, passed the bill upon caution; and Wilson, after the lapse of fourteen days, presented a second bill, praying to have it passed without caution. Lord Medwyn accordingly did so. Mitchells then reclaimed, and contended that the second bill was incompetent,—1. Because it had not been presented to the next succeeding Ordinary;—and, 2. Because, as the bill had been passed by Lord Gillies, it was not competent to bring his judgment under review, otherwise than by reclaiming to the Court. To this it was answered,—1. That the provision in the act of sederunt, 14th June 1799, in relation to the succeeding Ordinary, had been found impracticable, and had not been acted on;—and, 2. That where a bill without caution was passed upon caution, this was equivalent to refusing the bill; and accordingly a certificate of no caution would have that effect;—that it was only in cases where bills were passed simpliciter that it was necessary to reclaim to the Court, because in that case it was impossible for the charger (to whom alone that interlocutor was hostile,) to bring it under review of the Lord Ordinary, and therefore he had no other course than to apply to the Court. After hearing counsel in terms of the late statute, the Court repelled the objections to the competency; and being satisfied that the indorsation was a forgery, adhered to the interlocutor.

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3.

*Suspender's Authority.*—Jackson, March 3. 1825, (ante, Vol. III. No. 407.)

*Charger's Authorities.*—A. S. 14th June 1799; Morison, March 9. 1824, (ante, Vol. II. No. 720.)

C. FISHER,—W. GUTHRIE,—Agents.

No. 234.

WILLIAM MUNRO.—*Moncreiff—Pyper.*  
 Mrs. B. MUNRO and Others.—*Jameson—A. Wood.*

## Competing:

*Clause—Personal Exception.*—Held,—1.—That a general trust-deed of conveyance carries claims for ameliorations on a farm competent to the granter, but not payable till the end of the lease, though he die prior to that event; and,—2.—That an heir having acknowledged the right of trustees to a lease, as falling under a general conveyance to them, by possessing the farm for several years on a missole from them, is not entitled to claim the lease in his character of heir.

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 M'K.

By deed of settlement, the late George Munro conveyed, in general terms, to his widow and certain other persons as trustees, 'All and sundry my heritable and moveable goods and gear, sums of money, and other effects particularly after assigned, pertaining or belonging, and which shall pertain and belong, or be addebted, resting, or owing to me at the time of my death;' and particularly, without prejudice of the said generality, he assigned and conveyed 'all and whole the several debts or sums of money, corns, cattle, &c., that may happen to pertain to me at the time of my death, in manner underwritten.' The deed further contained a particular description of certain heritable and other claims comprehended in the conveyance; and it declared, that 'whereas William Munro, my eldest son, (who was then abroad,) has already received from me more than a child's share of my means and effects, I hereby utterly seclude and debar him from any share or interest, or right or title whatever to any part of my means and estate, real and personal, hereby disposed.' George Munro, along with his second son Harry, (who was appointed one of the trustees in the deed of settlement,) held a lease of the farm of Linlair, granted 'to George Munro, and Harry Munro, his second lawful son, and to their heirs and successors, secluding assignees and subtenants,' by which it was provided, that the tenants 'and their foresaids' should be entitled to receive from the landlord, at the expiry of the lease, £200, in the event of their building a house, and also the value of all stone enclosures they might make on the farm. George Munro, after having built a house and enclosures to a considerable extent, died in 1815, when there were still seven years of the lease to run. William, the eldest son, had returned to this country before his father's death, and shortly after this event he entered into an arrangement with the trustees by missives, whereby it was agreed that he was to take the farm off their hands, and should get the stock and cropping at a valuation; and he bound himself to pay, at the ex-

piry of the lease, the value of the 'present enclosures.' On this missive he continued in possession of the farm till the lease expired in 1832, when the landlord brought a multiplepinding, to have it determined who had right to the £200 provided to be paid for the houses, and to the value of the enclosures. The trustees claimed to be preferred to the £200, and the value of the enclosures existing and estimated at George Munro's death, on the ground that they fell under the general conveyance in the trust-deed. William Munro claimed to be preferred, on the ground that the general conveyance was not sufficient to carry the lease of Limlair, which secluded assignees, the more especially as, in the particular enumeration of the subjects conveyed, there was nothing included of the same character with the lease; and that therefore the lease, with all the claims for ameliorations arising out of it, fell to him as his father's heir; and he alleged that when he entered into the missive, by which he took possession of the farm, and bound himself to pay the value of the enclosures, he was not aware of the tenor of his father's settlement, but had erroneously supposed that the lease was specially conveyed to the trustees. The Lord Ordinary preferred the trustees to the fund in medio, and the Court unanimously adhered.

The Lord Ordinary, as stated in a note, was of opinion that the trust-deed carried the lease, and that the general conveyance of all heritable and moveable property was not limited to the particular subjects and funds specified, as it expressly included subjects belonging to the granter at death; and that although the landlord might have challenged this conveyance, (which challenge might, however, have been evaded by Harry Munro, who was one of the trustees, possessing for them under the lease,) yet that the heir could not object after acknowledging the right of the trustees, by taking a sublease of the whole farm from them; 'and, not to dwell on the difficulty that he is not heir of more than a half *pro indiviso*, it seems to the Lord Ordinary that it is too late for him to attempt raising this question, and that he is barred by his own conduct, which is substantially a transaction and settlement of the whole matter, not reducible on any sufficient ground.'

**LORD GLENLEE.**—It is unnecessary to determine whether the lease was conveyed by the trust-deed, or whether the transaction between William Munro and the trustees was of the nature of a sublease or not. The claim for meliorations, at least, was a debt existing in favour of old Munro at the time of his death; and the stocking being undoubtedly conveyed, there was room for a transaction, and William Munro is bound by the regular bargain under which he got the stocking at a valuation, on his binding himself to pay the amount of ameliorations existing at the death of his father.

**LEON PITHELLY.**—There may be some difficulty as to whether the lease was conveyed. I rather think that it was; but it is unnecessary to determine that in deciding this question. The stocking, and the claim for ameliorations, which is a moveable right, were undoubtedly conveyed; and besides, the right of the trustees has been sufficiently acknowledged by writing, and by the conduct of William Munro.

**LORDS JUSTICE-CLERK** and **ALLOWAY** concurred, and stated their opinion that the lease was carried by the trust-deed, but held that the determination of that point was not necessary to the decision of the cause, as the claims for meliorations were conveyed by the deed, and as the heir had barred his claim by the transaction with the trustees, and his possession following on that agreement. They also considered, that, in the circumstances of the case, it was impossible to believe that William Munro was ignorant of the terms of his father's settlement when he entered into this transaction.

*William Munro's Authorities.*—**ERIK.** 3. 4. 9. and 2. 2. 6; **Cases in Dict.** Vol. I. p. 342.

**MACMILLAN** and **GRANT, W. S.**—**J. MACDONELL, W. S.**—Agents.

No. 235.

**A. M'LEOD, Advocate.**—*Pyper.*

**J. BISSET, Respondent.**—*D. Macfarlane.*

*Arbiter.*—Parties in a submission are liable for the expense of employing an accountant to whom the arbiter has remitted books, &c. to draw out a state of accounts.

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B.

**M'LEOD** and **KEMP**, who had carried on business in partnership, on winding up the concern, entered into a submission of their accounts to Mr. Hay Wright, a merchant in Glasgow, who remitted the books, &c. of the concern to Spence, an accountant, to make out a state of accounts between the parties. Spence having assigned his claim for remuneration to Bisset, the latter raised an action for the amount before the Sheriff of Edinburgh against M'Leod and Kemp, and Wright the arbiter, conjunctly and severally. Kemp and Wright allowed decree to go against them by default; and the Sheriff ultimately decreed also against M'Leod, who thereupon presented a bill of advocation. The Lord Ordinary refused the bill, and stated in a note—'The decree—arbitral standing unreduced, the complainer has the benefit of the respondent's work, and therefore should pay for it. Had the arbiter himself acted as accountant, he must have been paid for that work, and ought to have been paid more highly, since his trouble would have been greater than that of Mr. Spence, from want of habitual expertness in that art.' M'Leod reclaimed

by note against his Lordship's interlocutor, and argued that the arbiter would not have been entitled to make such a charge himself, and had no power to delegate the duty to an accountant; and that as he had been ignorant of the remit, he had not rendered himself liable by acquiescence. The Court, without hearing the respondent's counsel, unanimously refused the note.

*Advocator's Authorities.*—Kennedy, Jan. 20. 1818, (F. C.); Paterson v. E. of Breadalbane, Feb. 19. 1819, (in a note to the former.)

*Respondent's Authorities.*—M'Callum, June 26. 1810, (F. C.)

R. WELSH,—J. C. WILSON,—Agents.

J. SPENCE, Petitioner.—*D. Macfarlane.*

No. 236.

*Sequestration.*—Warrant granted to examine a bankrupt residing in Prussia.

THE Court, on the application of Spence, as trustee on the sequestrated estate of Borthwick and Company, granted warrant and commission to examine Bruce Borthwick, one of the partners residing at Königsberg in Prussia.

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1st DIVISION.  
H.

CAMPBELL and BURNSIDE, W. S.—Agents.

JOHN CALDER, Advocator.—*Monteith.*

No. 237.

JOHN CALDER, Respondent.—*M'Neill—H. Bruce.*

*Proof—Oath in Litem or Supplement—Citation.*—Held,—1.—That a pursuer is entitled by his oath to supply a defect in evidence arising from the suspicious disappearance of a book in the custody of the defender.—2.—That an objection to the service copy of citation cannot be listened to in opposition to an ex facie correct execution not reduced, and that the act 1698, c. 12, does not extend to citations before Inferior Courts.

ALEXANDER CALDER, the advocator's father, was a Sheriff officer in Glasgow, and was in use to employ his brother, the respondent, as a concurrent. The former died in 1821; and the respondent, after having repeatedly demanded a settlement from his son the advocator, raised an action before the Sheriff of Lanarkshire for payment of the amount due him for his services; and he offered to instruct his claim by the books of the deceased. The advocator was accordingly ordained to produce his father's books, one of which was a day-book, in which the employment of the respondent and other concurrents for several years had been inserted. This book he alleged to have been lost, although he admitted that he had been in possession of it within three months from the commencement of the action, and he could give no satis-

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2d DIVISION.  
Bill-Chamber.  
Lord Medwyn.  
F.

factory account of the manner in which it was lost. Upon this, the Sheriff allowed the respondent to give his oath in litem (in support of evidence appearing from the other books) as to the amount of his claim, and decreed for the sum deposed to by him. In a bill of advocacy, the advocator, besides his pleas on the merits, contended that the citation to the action in the Sheriff Court was invalid, in respect that the service copy did not contain the names and designations of the witnesses present at the execution, in terms of the act 1698, c. 12. The Lord Ordinary refused the bill, and the Court unanimously adhered.

**LORD PITMILLY.**—The interlocutor is right. In regard to the objection to the citation, the act of Parliament does not apply to summonses before Inferior Courts, and there is no reduction of the execution. As to the merits, the suspicious disappearance of the book is almost decisive of the case, and entitled the respondent to have his oath in litem admitted.

**LORD ALLOWAY.**—From the books produced, the claim is almost made out; but, at all events, the loss of the book, which was in existence so near the commencement of the suit, warranted the step taken by the Sheriff. The preliminary defence cannot possibly be sustained in the face of a regular execution not reduced.

**LORD GLENLEE.**—Even if the book were held to have been innocently lost, yet, in a case where it is admitted that parties were in a course of dealing, and where the book is the document of both parties, (as it must be considered here,) the party losing the book through his negligent keeping cannot object to the oath of the other party to make out his claim, there being otherwise reasonable grounds (as there are here) to believe it correct.

**LORD JUSTICE-CLERK.**—I entirely concur on both points. The respondent had as much interest in the book as the advocator. His claim is nearly made out by the books extant; but any defect of evidence arising from the loss may properly be supplied by the oath in litem.

**J. HAMILTON, W. S.—J. BOWIE, W. S.—Agents.**

No. 238.

**J. EYRE and Others, Pursuers.—Brown.  
SKINNER'S TRUSTEES, Defenders.—Trustee.**

**6. Geo. IV. c. 120.—Deduction in Absence.**—Held that the expenses payable on being reponed against a decree in absence do not include the expenses of the summons.

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1st Division.

Lord Meadowbank.

S.

**Decree in absence** having been pronounced, in terms of the 6. Geo. IV. c. 120, against Skinner's trustees, the Court reponed them on producing defences, and paying the expenses incurred subsequent to the summons.



The Lord President stated, that the Court had consulted with the other Division, and that the Judges were of opinion, that as the *enuncione* remained an useful and available document to the pursuer, the defender could not be required to pay the expense of it.

J. CRAWFORD, W. S.—T. WALKER,—Agents.

JOHN ROBERTSON, Advocate.—*Shena*—R. Thomson.

No. 239.

JEAN PETRIE, Respondent.—A. M. Neil.

*Defender—Proof.*—1.—Connexion with a woman having been admitted about six calendar months 'or so' before the birth of her child, and the circumstances being such as to permit intercourse a month earlier, this was presumed to have taken place, and was held sufficient, with the woman's oath in supplement, to fix the paternity.—2.—*Proof that the child was full-grown at birth, refused.*

JEAN PETRIE, a married woman, residing in Perth, but whose husband had been in the West Indies since 1822, having been delivered of a child on the 6th December 1824, raised an action of filiation and aliment before the Sheriff of Perth against Robertson, whom she alleged to be the father. The Sheriff having appointed him to be judicially examined, he emitted a declaration, in which he stated that he had arrived from London by the steam-packet on the 30th April 1824, (having been on the Continent during the preceding winter,) and reached Perth that afternoon—that about a month afterwards or so' he met and had connexion with Petrie for the first time, and that he also had connexion with her on three subsequent occasions. Petrie adduced no further evidence; but the Sheriff found that this declaration amounted to a *semiplena probatio*, and admitted her oath in supplement. She deponed 'that the defender was really and truly 'the father of her child.' The Sheriff decerned against him accordingly, and stated in a note, 'The defender's admitted connexion with the pursuer six calendar months and six days previous 'to the birth of the child, and his being in the city where she resided a month antecedent to such admitted connexion, are circumstances which leave no room for doubt on the subject, in 'applying the principles of law hitherto recognised in questions of 'legitimacy.' Robertson then presented a bill of advocation, on the grounds, 1. That Petrie being a married woman, the rule of law, *pater est quem nuptiæ demonstrant*, must fix the paternity. 2. That there being no evidence of any previous acquaintance between the parties, no connexion could be presumed prior to that admitted by him to have taken place, for the first time, six months and six days before the birth of the child, which was not

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B.

sufficient to fix on him the character of father; and, 3. That even should connexion be presumed to have taken place immediately on his arrival in this country, he offered to prove that it was a full-grown child at birth, and must therefore have been conceived before that period. The Lord Ordinary refused the bill, and the Court adhered.

**LORD ALLOWAY.**—The plea founded on the respondent's being a married woman is completely obviated by the clear evidence of her husband's absence from this country. The other question must be considered on the same general principle which would apply to the case of legitimate children. The advocator admits that he had connexion with the respondent four times; but he says it did not commence till about thirty days after his arrival. Now there is no case in which connexion has been admitted, where it has not been carried back to the period when it might have commenced. The legal presumption is, that he might have had connexion on the day of his arrival; and from that, till the birth of the child, there elapsed eight lunar months, with the exception of four days. According to the authority of the case of Carruthers, it would be sufficient to fix the paternity, although there was a month less; and, according to Lord Stair, the birth of the child, any time from six to ten months, would be sufficient for that purpose. Here it comes to within four days of eight lunar months, and the advocator must accordingly be held to be the father of the child.

**LORD JUSTICE-CLERK.**—If the Court are to presume an earlier connexion than what is admitted in the declaration, I should not have much objection to the interlocutor. If it rests, however, on the admitted facts, I would hesitate to sustain it, as establishing an abstract rule of law as to the period of gestation,—especially as it is offered to be proved that the child was born at full maturity.

**LORD PITMILLY.**—My opinion does not rest on the presumption founded on by the Sheriff,—but on this, that the declaration is vague as to the period which elapsed between the advocator's arrival and the first connexion, it being stated to have taken place 'a month thereafter, or so;' and I rather think that it would be dangerous to allow a proof of full growth.

**LORD GLENLEE.**—We must consider the declaration of the advocator, as to the period of connexion, to amount to this, that it took place 'there or thereabouts.'

*Advocator's Authorities.*—Paris and Fonblanque Med. Jur. p. 244; 2. Foderé Med. Legale, 109. 110; Tait, 287; Paul, Dec. 4. 1824, (ante, Vol. III. No. 368.)

*Respondent's Authorities.*—Hunter, May 24. 1814, (F. C.); Routledge v. Carruthers, May 19. 1812, (F. C.); Tait, 285; 3. Stair, 3. 42; 1. Ersk. 6. 50; 1. Mahon Med. Legale, 238. 247.

A. GIFFORD,—A. BAYNE,—Agents.

C. RUSSEL, Pursuer.—*Keay*.  
Earl of BREADALBANE, Defender.

No. 240.

*Process*.—An application to apply a judgment of the House of Lords must be made, not by note, but by petition as formerly.

THIS was an application, in the form of a note, to have a judgment of the House of Lords applied. The Court refused to receive it, and directed the application to be made by petition.

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M.K.

VANS HATHORN, W. S.—H. DAVIDSON, W. S.—Agents.

Earl of FIFE, Pursuer.—*D. of F. Cranston—Jeffrey—Cockburn—Robinson*.

No. 241.

Sir J. DUFF and Others, Defenders.—*Thomson—Fullerton—Moncreiff*.

*Writ, Authentication of*.—Held to be a valid ground of reduction of a deed, that one of the instrumentary witnesses neither saw the grantor subscribe, nor heard him acknowledge his subscription, although there be no allegation that the deed is false.

Dec. 22. 1825.  
2d DIVISION.

IN an action at the instance of the Earl of Fife, concluding for reduction of two deeds of trust-disposition, settlement, and entail in favour of Sir James Duff and others, executed by the late Earl, ex facie probative, and bearing to be signed by his Lordship in presence of two witnesses designed and subscribing, on the grounds, inter alia, that the Earl, being blind, ought to have executed the deeds by notaries; that the deeds were not read over to him at signing, and that one of the instrumentary witnesses had neither seen his Lordship subscribe the deed, nor heard him acknowledge his subscription; the Court remitted certain issues in fact to be tried by a Jury, who returned a verdict finding that the Earl was so blind as to be totally incapable of reading any written instrument or printed book, or of seeing whether a paper was written upon or not;—that the deeds under reduction were not proven to have been read over to the Earl previous to his subscribing;—that he had subscribed in presence of one of the instrumentary witnesses, but that it was not proven that he had acknowledged his subscription to the other. On considering this verdict, the Court reduced the deeds, in respect that the parties using them had not proved that they were read over to the Earl, he being incapable of reading them himself by reason of blindness; but gave no judgment as to the objection to the instrumentary witness. On an appeal against this judgment, the House of Lords found, 'that

‘ under the circumstances of this case, notwithstanding the defect  
 ‘ in sight of the Earl of Fife, proved upon the issues formerly  
 ‘ tried in this cause, the signature of the instrument in question  
 ‘ by notaries was not required by the statute of 1579, and that  
 ‘ the signature of the Earl of Fife, was the proper signature to  
 ‘ give effect to those instruments, according to the true intent and  
 ‘ meaning of the statute;—that the signature of the Earl of Fife  
 ‘ appearing on the face of the said instruments, and the instru-  
 ‘ ments being apparently attested by two witnesses, the instru-  
 ‘ ments apparently so signed and attested are in law probative  
 ‘ deeds;—and that, to impeach such instruments as probative  
 ‘ deeds of the Earl of Fife, the pursuer was bound to prove that  
 ‘ the witnesses, or one of them, did not see the Earl of Fife sub-  
 ‘ scribe the said instruments respectively, or hear him acknow-  
 ‘ ledge his subscription thereto:’—And with certain other find-  
 ings as to the deeds not having been read over to the Earl, the  
 House reversed the judgment of this Court, (except in so far as  
 the pursuer’s title had been sustained), and remitted the cause  
 with instructions to the Court to direct an issue to try, ‘ Whether  
 ‘ the instruments of trust-disposition and deed of entail sought to  
 ‘ be reduced, being in law probative instruments, were not, or  
 ‘ either of them was not, the deeds or deed of the Earl of Fife:’  
 the burden of proof being laid on the pursuer seeking to reduce  
 the deeds.

An issue in terms directed by the House of Lords was ac-  
 cordingly sent to a Jury, at the trial of which the pursuer con-  
 fined his evidence to the reason of reduction founded on one of  
 the instrumentary witnesses not having seen the granter sub-  
 scribe the deeds, or heard him acknowledge his subscription. In  
 charging the Jury, the Lord Chief Commissioner directed them,  
 ‘ if they were satisfied that the evidence given on the part of the  
 ‘ pursuer established that the granter of the deed had not ac-  
 ‘ knowledged his subscription to the witness who did not see  
 ‘ him subscribe the said deed, to find by their verdict that the  
 ‘ said deed was not the deed of the Earl of Fife, and did tell the  
 ‘ jury that the law required, in cases in which a witness does not  
 ‘ see the granter of a deed sign the deed, that he must acknow-  
 ‘ ledge his subscription to such witness, otherwise the deed is void  
 ‘ in law, and therefore is not the deed of the granter.’ To this  
 direction the defenders excepted, as contrary to law; and a verdict  
 having been returned in favour of the pursuer, finding that the  
 deeds in question were not the deeds of the Earl of Fife, their bill  
 of exceptions came to be argued before this Court.

In support of the bill it was pleaded:—The law of Scotland has

from the earliest periods acknowledged a distinction not admitted in other countries between probative and improbative deeds, the latter being either null, or requiring other evidence to support them, and the former bearing faith of themselves without extraneous support. Prior to statutory regulations, it was sufficient to constitute a probative deed, that the names of persons should be insert in it as witnesses. This was not because a person could not bind himself except in presence of witnesses, (which undoubtedly he can do, as in the case of holograph deeds), but to point out certain persons, to whom the granter appealed, as parties by whom the truth of the deed could be supported, if alleged to be false. The persons so insert were the only witnesses by whom the truth or falsehood of the deed could be proved, and they were therefore called 'probative witnesses,' and the deeds in which they were insert were probative deeds. But the witnesses were never appealed to, unless the deed was challenged as false; and when so appealed to, it was of no consequence whether their causæ scientiæ of the truth or falsehood of the deed arose from their having been present at its execution, or from other causes. It was sufficient, to support the deed, if they could depone that they knew it to be true. It therefore appeared, that, at common law, the presence of witnesses at the execution of a deed was not necessary. It was sufficient to render a deed probative that there were witnesses insert, who, from whatever cause of knowledge, could declare the deed to be true, if alleged to be false, in which case alone it was necessary to appeal to them. Such having been the law originally, the several acts of Parliament, though establishing additional criteria for ascertaining *ex facie* probative deeds, do not introduce any new rule rendering the presence of witnesses essential to the validity of the deed. The act 1540, c. 117, requires the subscription of the granter, as well as his seal. The statute 1579, c. 80, relates, so far as regards the provision as to witnesses, to the case of subscription by notaries only; and the object of 1593, c. 179, was to require insertion of the writer's name; but the law as to witnesses remained unaltered till the passing of the act 1681, c. 5, on which alone the doctrine excepted against can possibly be supposed to rest. That act, however, while it remedied many defects in our system of authentication of deeds, did not require, under the sanction of nullity, that the witnesses insert, and who were now made parties to the deed and required to sign it, should see the granter sign, or hear him acknowledge his subscription. It subjected the witnesses to severe penalties, should they through negligence subscribe a deed which was false, making them in that case, but in that case only,

liable as accessories to the forgery; and it guarded them against this risk by enjoining them not to subscribe as witnesses, unless they had seen the party subscribe, or heard him acknowledge his subscription. But the deed was not declared null, should they neglect these means to secure themselves against responsibility, and their testimony was still, as formerly, sufficient to support the deed, whatever was their *causa scientiæ* of its truth. The great object of the statute was to afford means of supporting true deeds against the falsehood or forgetfulness of witnesses, and that object would be completely defeated, were their omission to take all the precautions recommended in the act, to render the deed null; or were the granter enabled, by signing an *ex facie* probative instrument outwith the presence of witnesses, afterwards to avoid his own deed by virtue of a latent nullity known only to himself. As to the authorities, there undoubtedly has been a common prejudice among lawyers that the defect here founded on was fatal to the deed, and in several cases proof has been allowed of objections similar to those in the present case; but these have always been coupled with a denial of the verity of the deed, which is admitted here; and the proof has uniformly been allowed before answer, and without much discussion, except in the case of *Smith v. the Bank of Scotland*, where the decision was favourable to the pleas of the defenders. But whatever may have been the practice, the act 1681 being the rule, no former erroneous construction can bind the Court to continue to decide contrary to the meaning and intent of the act of Parliament.

For the pursuer it was answered:—The argument of the defender rests on the fallacy of maintaining that instrumentary witnesses are nothing more than persons putting their names to a deed. That, however, does not constitute one an instrumentary witness. It is not enough that he exhibit his attestation of credulity; he must actually see the party subscribe, or hear him acknowledge his subscription, or he is not a witness. If the mere subscription of the witness, without seeing, &c., were held sufficient, it would be preferring the form of the solemnity to the essence which was meant to be secured. Nor is the defect more latent than an erroneous designation of the witness or writer of the deed, or than the witnesses being minors, &c., which are admitted to be fatal. All our writers trace our system of authenticating deeds to the Roman law, as expressed in the 73d Novell of Justinian, which requires the signature of the granter to be affixed in presence of witnesses; and from all our authorities it is clear that none were ever recognised as witnesses in our law, prior to the act 1681, who were not actually present at the execu-

tion. This is implied in all the acts of Parliament ; and the act 1579, even supposing it to be confined to the case of deeds subscribed by notaries, shows that wherever witnesses are required, they must be witnesses present at the time of execution. Prior to the act 1681, a very loose practice prevailed of allowing the omission to insert the names of witnesses to be supplied by a condescendence. In these cases, however, the parties never condescended on persons who could depone to the genuineness of the deeds, from their knowledge of the granter's handwriting or the like, but on persons actually present at the subscription ; and there is not an instance of a person, who was not present, ever having been admitted to support a deed. The act 1681 admitted the hearing an acknowledgment as an equivalent to actually seeing the subscription ; but it further defined those who were to be held as probative witnesses, and who might subscribe, and have their names insert as such. But those only are declared to be probative who have seen the subscription, or in whose presence acknowledgment has been made ; and a witness subscribing, who has not seen or heard, is declared punishable, whether the deed be true or false, as having attested a falsehood. There is not, to be sure, an express declaration of nullity of the deed, which was unnecessary, seeing it would be a deed without witnesses and consequently null, if these were not probative in terms of the act, and this construction of the act has been sanctioned by unvarying practice. It is said, that unless the defect as to solemnity be coupled with an allegation that the deed is false, it has never been listened to. This is not the case. There are several instances of challenge on this ground, where the subscription of the granter was admitted ; and when a deed has been challenged on such grounds, and a proof allowed, the question to the witnesses has not been, Is this a genuine deed ? but, Did you see the party subscribe, or hear him acknowledge his subscription ?—Many deeds have been reduced in respect of the defect founded on here, and of other defects of solemnity, not sanctioned by an express declaration of nullity in the act 1681 ; and in a still greater number has a proof been allowed, the relevancy of such allegations being thus sustained. And although these proofs may have been allowed before answer, such a practice would never have been followed for a century, had not the Judges been satisfied of the doctrine, that if there be not two instrumentary witnesses who have seen the granter subscribe, or heard him acknowledge his subscription, the deed cannot bear faith ; and this doctrine is also supported by the terms of the judgment of the House of Lords in the present case.

The Court unanimously disallowed the exception.

**LORD GLENLEE.**—The simple question here is, Whether a deed, in which one of the instrumentary witnesses has neither seen the granter subscribe, nor heard him acknowledge his subscription, *per se* bears faith, or not?—I must confess that I have always understood it to be a settled question, that where nothing has followed on such a deed, it bears no faith. It is a very different question, when a great deal has been done by the parties on the faith of the deed, whether benefit can be taken of the nullity or reduction allowed. No nullity arising from defect of solemnity can be greater than that from the want of the subscription of the party. Yet disability to bear faith on this ground may be removed by homologation; as in the case of a contract of marriage unsubscribed by one of the parties, but followed by marriage, or of a tack not probative under the act 1681; if possession follows, the landlord is not entitled to set it aside; but he is so, even although he admits his subscription, if the tenant has not entered. If a general rule can be laid down as to such cases, it is of this description—that where a party has given forth a deed out of his hand as fair and regular, and binding on him, and has dealt with the world on the footing of its being binding; if he attempt to reduce it on latent nullities known only to himself, and arising from his own act, as signing outwith the presence of witnesses, reduction would not lie; and this was in fact the case of Smith. But no such grounds for repelling the reasons of reduction apply here, where nothing whatever has been done. The only question is, whether the deeds in this case, *vi instrumenti*, alone bear faith? and I have no doubt that they do not bear faith, independent altogether of the act 1681. Where there are only two witnesses, and one of them did not see nor hear acknowledgment, the testing clause is false, and we must take the case as if the testing clause had borne that the subscription was before a single witness, and unless one witness to a deed is sufficient, the exception cannot be sustained.

**LORD PITMILLY.**—The expressions in the judgment of the House of Lords in this case most accurately convey the true meaning of witnesses in the law of Scotland, viz. that mere subscription as witness makes only an apparent witness, but not one in law or in reality. The defenders adopt a radical mistake as to our rules of authentication. They say it is of no consequence from what cause the witness can attest the verity of the party's subscription, if he can do so in fact. This is not the case. He is never called on to say whether that is the granter's subscription, but whether he saw him subscribe, or heard him acknowledge his subscription. As to the authorities, they are all on the side of the pursuer, with the exception of the case of Smith, which has been already explained by



Lord Glenlee. In some of the cases the deeds were reduced, in others they were sustained from defective evidence; but whether reduced or sustained, they are equally strong authorities as to the doctrine of law.

**LORD ALLOWAY.**—I entirely concur with the observations of Lord Pitmilley. In every period of our law, it has been the uniform opinion of Lawyers and Judges, that two witnesses who were present at the execution are absolutely necessary to attest a deed. All our institutional writers concur in this, and all our decisions imply the necessity of the presence of witnesses, both before and after the act 1681. It is said the defect is latent. Is not the circumstance of the witness not knowing the granter, which is a nullity under the act 1681, or his being a pupil, much more so? The question comes to this, Can a deed be effectual where there is only one witness? and it is impossible to entertain a doubt but that it cannot.

**LORD JUSTICE-CLERK.**—This question is one of great importance, both in regard to the law and the matter at issue; and I consider it to depend on the consideration of the act 1681, in combination with the previous statutes, and the clear principles of our law. Our system of authentication of deeds is of a peculiar nature, and admirably adapted for the security of those claiming interest under them. It is clearly to be traced to the Roman law; the principles laid down in the Novell of Justinian have been adopted in our statute and common law, and particularly that leading principle which requires the presence of the witnesses. No stronger proof of this can be required than the words of the *Regiam Majestatem*, which are more emphatic as to this point in the Latin than in the translation. This is the earliest record of our law, and negatives the idea that the presence of witnesses was not always considered necessary. Independently of this, the act 1540 implies that they must be present, and the same must necessarily be inferred from the terms of the subsequent statutes to the act 1681, which was meant to establish an universal code as to the authentication of deeds; and it is a fair argument as to it, that the sanction of nullity pervades all its provisions, though not expressly declared as to each. It defines who is a probative witness, who must either see the party subscribe, or hear him acknowledge his subscription; and it creates a species of crime of falsehood, for which a witness, subscribing without having so seen or heard, might be indicted, whether the deed be true or false. Nullity, as to neglect of the act in this and other particulars, is embodied in the imperative direction of the Legislature, as was found in regard to an execution of a summons signed merely by the initials of the witness; and considering the whole act in combination with the principles of our law, it clearly follows that no faith is to be given to an instrument not authenticated in terms thereof. It is satisfactory, however, that

the Court is not called on to decide this point for the first time. An uninterrupted series of decisions exist to this effect, and establish that a deed, where one of the instrumentary witnesses has not seen the granter subscribe, or heard him acknowledge his subscription, cannot make faith, any more than a deed with only one witness; while those founded on by the defenders are merely cases where there was a defect of evidence. The question of fact is always a very delicate matter; but when it is fixed, (as it is in this case by the verdict of a Jury,) the law is clear, as laid down by the presiding Judge at the trial; and the bill of exceptions must therefore be disallowed.

*Pursuer's Authorities.*—Novell. 73. de Inst. de Cust. et Fidel.; Reg. Maj. 2. 38; 1540. c. 117; 1579, p. 80; 1681, c. 5; Mackenzie's Obs.; Kilk. in D. of Douglas, Art. 8. v. Writ; Bell on Testing of Deeds; 1. Bank. 11. 23. and 10. 229; 2. Enk. 2. 7; Stevenson, 1682, (16886); Blair and Peddie, 1684, (15947); Campbell, Nov. 1698, (16887); Phillips, June 18. 1788, (Elchies, No. 10. v. Witness); Shaw v. M'Phail, (mentioned A. S. Feb. 6. 1765; Young and Ritchie, Feb. 2. 1761, (17047); Walker v. Adamson, June 8. 1716, (16896); Sibbald, Jan. 18. 1776, (Bell, p. 245); Frank, June 10. 1809, (F. C.)

*Defenders' Authorities.*—4. Stair, 42. 4; Bell, Jan. 22. 1685, (12596); Falconer, Feb. 3. 1665, (16883); Lord Eskgrove in Frank, June 10. 1809, (Bell on Testing Deeds, p. 259); Sim, Nov. 22. 1708, (16891); Walker, Jan. 8. 1716, (16896); Young and Denholme, Aug. 2. 1770, (16905); Sibbald, Jan. 18. 1786, (16906); Balfour, Jan. 24. 1790, (Bell, p. 246); Smith v. Bank of Scotland, 1821, (F. C.); Condie, June 26. 1823, (ante, Vol. II. No. 410.)

W. COOK, W. S.—J. and W. JOLLIE, W. S.—Agents.

No. 242. Earl of FIFE, Pursuer.—*D. of F. Cranstoun—Jeffrey—Cockburn—Robertson.*

Sir J. DUFF &c., Defenders.—*Thomson—Fullerton—Moncreiff.*

*Obiter Dictum—Jury Court.*—An opinion in law being stated by a Judge in delivering his charge to a Jury, but he at the same time observing that it was unnecessary to the case, is to be considered as obiter dictum, and not to form the ground of an exception for misdirection.

Dec. 22. 1825.

2d DIVISION.  
F.

THIS was likewise a bill of exceptions taken by the defenders to the direction of the presiding Judge at the trial mentioned in the preceding case. The bill narrated part of the evidence given on the trial, and stated, as the charge excepted against, this direction, which had been put in writing, and read to the Jury by the Lord Chief Commissioner, as follows:—‘That in this case he ‘was of opinion that there was undoubted evidence (and it was ‘admitted) that there had been no acknowledgment by words ‘to the witness who did not see the said Earl sign: That, in considering any other acknowledgment, he told the Jury that it

‘ was his opinion the acknowledgment must be clear and explicit, and that he had not found any case in which a virtual acknowledgment or equipollent had been sustained; but that it was not necessary to carry the doctrine so far in this case, as, according to the evidence of the two witnesses called by the pursuer, (if they, the Jury, believed either of them,) it did not appear that there was any acknowledgment, either express or virtual.’ In support of this exception, the defenders pleaded, that it was not necessary that an acknowledgment should be either expressed by words, or by any positive gestures in use among mankind as conventional signs of agreement, but that there might be a perfectly legal virtual acknowledgment without these, as was found in the case of Balfour, where a party was held to have acknowledged his subscription, who neither used words nor signs; and that although the Judge had told the Jury that the doctrine needed not be carried so far in this case, as there was not even a virtual acknowledgment proved, still the Jury might have entertained a different opinion as to the fact, and thought that a virtual acknowledgment had been proved, in which case their verdict would be influenced by this misdirection in law. To this it was answered, that the words ‘ clear and explicit acknowledgment,’ used by the Judge, comprehended such a case of acknowledgment as was stated by the defenders to be virtual, under which last description the Judge meant something that was not an acknowledgment at all, but an equivalent, as if Lord Fife had granted power to his factor to acknowledge for him, or the like. And further, that the observations of the Judge were not directions to the Jury in the case, but were obiter dicta, which, he told the Jury, were unnecessary to the cause. The Court unanimously disallowed the exception.

**LORD GLENKELIE.**—This bill also must be dismissed. The direction excepted against amounts merely to this—I have certain opinions, but they are of no manner of consequence here. The Judge withdraws the direction complained of, and this Court has therefore nothing to do with it.

**LORD PITMILLY.**—As some observations have been made in regard to the bill not having been given by the Jury Court in the terms asked for by the defenders excepting, especially in regard to the statement of evidence, I think it right to state the rule which the Jury Court have adopted, in relation to such questions, under the authority of a decision in the English Courts. It is this—that the narrative of the bill should contain a statement of as much of the evidence as is necessary to show the circumstances under which the direction was given; and that it should abstain from giving

any other part of the evidence not necessary for this purpose. On the merits, I do not think it necessary to enter into the criticism on the meaning of the words equipollents and virtual acknowledgment; but I put the case on the second ground, and I consider the exception an attempt to lay hold of an obiter dictum, excluded from the direction as unnecessary. If parties thought that an acknowledgment, either express or virtual, had been proved; their remedy was a motion for a new trial.

**LORD ALLOWAY.**—I cannot hold the direction to be bad law, as it does not exclude gestures; but at any rate there is no room to consider it here.

**LORD JUSTICE-CLERK.**—A direction cannot be excepted against, unless given for the guidance of the Jury; and although criticisms might be raised against this charge, if given as a direction, yet it was merely an observation in passing, which the Jury were told they did not require to consider, and which, therefore, they were not to hold as a direction.

*Defenders' Authorities.*—*Balfour*, Jan. 24. 1790, (Bell, p. 245); *Condle*, June 26. 1823, (ante, Vol. II. No. 410.)

W. COOK, W.S.—J. and W. JOLLIE, W.S.—Agents.

No. 243.

Mrs. HAY, Pursuer.—*Jeffrey—Marshall.*

G. BROWN, Defender.—*Moncreiff—More.*

*Trust—Compensation.*—Whether compensation can be pleaded on a claim under a trust-deed, the trustees being liable only for their own actual intromissions, against a private debt due to one of the number who had trust-funds in his hands.

Dec. 22. 1825.

2d DIVISION.

Lord Cringletie.

M.K.

THE late Robert Paterson, by his trust-deed of settlement, conveyed all his property, for behoof of certain residuary legatees, to Mr. Hay, W.S., and certain other persons, 'and the survivor or survivors of them,' as trustees and executors, whom he declared not to be liable for the insolvency of factors or persons to whom they should lend money, 'nor answerable for the intromissions of one another, but each of them allenarly for his own actual intromissions in virtue hereof.' Declaring further, that neither his heirs nor legatees should 'have any concern with the management of the said trustees, but that they shall be bound to accept of whatever sum is declared by the said trustees to be his or their shares of the residue of the effects.' Hay and two others accepted the office; and Hay, who likewise acted as their factor and agent, intromitted with part of the trust-funds. By a minute of the trustees, it appeared that, including a sum of £568 as due by Brown the defender, the whole trust-

funds amounted to £965, which would afford to each of the legatees (of whom Brown, the defender, was one) the sum of £138. Mr. Hay having died insolvent, and indebted to the trust-estate £258, his widow, the pursuer, was served executrix qua relict for behoof of the creditors, and as such raised an action against Brown for payment of £167, being the amount of a business account due by him to her deceased husband. In defence, Brown pleaded compensation on the share due to him out of Paterson's trust-estate, and on two other shares due to his brother and sister, from whom he had obtained an assignation, (but only after this process was raised,) amounting together to £413. He admitted that he had funds in his hands belonging to the trust to the extent of £211, but contended that he was entitled to plead compensation on the balance of £202, which, he argued, resolved into a personal claim against Mr. Hay, the trustees being only liable for their own actual intromissions, and none of them but Mr. Hay having intromitted. He also raised an action, calling all the surviving trustees and Mrs. Hay, for payment of the legacies; and the trustees raised a counter action against him for payment of his debt to the trust-estate, which they alleged greatly to exceed his claim. In answer, it was pleaded for Mrs. Hay,—1. That the amount allocated by the minute to each legatee proceeded on the assumption of Brown paying £563 to the trust-estate, which he had not done;—2. That there was no concursus, Mr. Hay's debt being due, not to Brown, but to the trustees, against whom alone Brown's claim lay;—3. That he could not plead on his brother and sister's shares assigned to him after the action was raised;—and, 4. That it remained to be ascertained in the action between him and the trustees, whether he was not indebted to the trust-estate in a greater amount than his claim. The Lord Ordinary decerned in terms of the libel, and the Court adhered.

The Lord Ordinary observed in a note—The set-off confessedly arises from a trust-fund, and is pleaded against Mrs. Hay as executrix of her husband, who is not a trustee of Mr. Paterson, and when none of his trustees are parties to this action. By the minute referred to by the defender, the divisible balance of £965 is composed of £563 due by the defender himself to the trust-estate. If, therefore, Mr. Hay had been alive, and had been pursuing this action, the defender could not have set off his share without calling the other trustees, who would not have consented to his retaining his share, without paying the balance between it and the large sum owing by him to the trust-estate. But, as already observed, Mr. Hay being dead, the trust, so far as regarded him, is at an end. His estate may be, and perhaps is, debtor to the trust-estate, but

the trustees are the persons to whom the purchaser is accountable; and she cannot allow the defender to plead compensation against a debt due to her husband as an individual, by setting off a debt due by the trust-estate. There is no *concursus debiti et crediti*.

**LORD GLENELG.**—On reading the petition, I thought that there was a good deal in the state of the case there set forth by the defender, as showing a direct personal claim against Mr. Hay. The minute, however, I now see, makes out the dividend by including the sum in the defender's own hands. He is owing more than £500 to the trust, and he gets his legacy, but will not pay his own debt. All we see here is, that the minute, so far as it ascertains any direct claim against Hay, ascertains also a claim against the defender; and in such circumstances the claim cannot be held personal against Hay. Mrs. Hay's claim is clear and liquid; and though it may possibly turn out that the defender has a personal claim against Hay, in which case the compensation would lie, there is at present no evidence of its existence, and we cannot wait the result of the other actions.

**LORD PITMILLY.**—It is clear that the trustees have a claim against Hay; it is equally clear that Brown's claim lies against the trustees. Hay's intromissions did not extinguish the trust, and any one having a claim on it must come against the trustees. Hay's death put his widow in the situation of a debtor to the trust, and the defender might as well attempt to bring his action against any other debtor, as against her. The trust still subsists; and it is plain, therefore, that there is no *concursus*, and no room for compensation, which can be pleaded only in the action brought by the trustees.

**LORD JUSTICE-CLERK.**—Under this trust or settlement the legatees have no direct action against Mr. Hay, although the trustees may claim against each other. Mrs. Hay is debtor, not to the defender, but to the trust-estate; and the minute founded on is merely hypothetical, that if the defender pay so and so, the legatees will have a certain dividend. I think that no compensation lies, and that the interlocutor must be adhered to.

**LORD ALLOWAY.**—I am sorry to be obliged to differ from the rest of the Court; but this appears to me a very simple case. Hay failed with trust-funds in his hands, and is he not personally liable to persons interested in the trust? They are personal creditors of Mr. Hay for the amount of their interest; none of the other trustees being liable, not having intromitted with the funds. Suppose that Brown had possessed the whole residuary interest in the trust, would not Hay's representatives be liable to him for every farthing of the funds in their hands; and does it make any difference whether he has the whole residuary interest, or only a part? It is a clear question of compensation between two personal claims; and as to the amount, it does not enter into the legal question.

*Purmer's Authorities.*—S. Ersk. 4. 18; M'Dowall and Selkirk, Feb. 6. 1834, (ante, Vol. II. No. 640.); Grierson, Feb. 25. 1780, (759); Douglas, June 29. 1796, (16318); Wilson, May 31. 1809, (F. C.); Mackie, Nov. 29. 1774, (2575); Dunlop, Jan. 15. 1796, (2671); Morrison, Dec. 5. 1822, (ante, Vol. II. No. 66).

*Defender's Authorities.*—Boyle, June 18. 1793, (2661); Scott, June 18. 1809, (F. C.); Russell, May 26. 1824, (ante, Vol. III. No. 43.); 2. Bell, 184.

A. THOMSON, W. S.—A. GIFFORD,—Agents.

A. H. M. BELSHES, Suspender.—*Jardine.*

No. 244.

Rev. R. MOORE, Charger.—*Sir J. Connell—A. Connell.*

*Grass Glebe.*—*Held.*—1.—That a minister cannot insist on having a grass glebe designed to him out of kirk lands adjacent to a manor-place, where a glebe equally as good and as convenient can be allotted to him out of other lands;—and,—2.—That he is not entitled to a pecuniary allowance for the want of a glebe during the currency of a litigation in which he was unsuccessful.

THE Rev. Mr. Moore, minister of the parish of Oldhamstocks, having no grass glebe, presented a petition to the presbytery of Dunbar, founding on the act 1668, c. 21, and praying to have a grass glebe allotted to him out of those kirk lands in the parish which were nearest to the manse. The presbytery, after causing an inspection to be made, designed a grass glebe out of certain kirk lands forming part of the estate of Blackcastle, then belonging to the suspender Mr. Belshes. Of this he brought a suspension on various grounds, but particularly, that as the lands which had been allotted were in the immediate neighbourhood of the ancient manor-place of Blackcastle, and which (although now in ruins) was on the spot most fitted for a family mansion, and as he was willing to give other lands equally as good, and as convenient for the clergyman, the designation ought to be altered. The Lord Ordinary, after making a remit to an inspector, repelled the reasons of suspension, and in a note stated, in reference to the plea by Belshes, that 'as to the objection of their lying adjacent to the manor-place, the allegations do not appear to the Lord Ordinary to be of that description that would authorize the Court to hold that they are to be exempted from the burden in question, to which by law they otherwise must be subjected.' Against this judgment Belshes reclaimed; and the Court, after appointing him 'to put in a special condescendence of the grounds he offers to have designed as a grass glebe for the respondent, instead of the grounds designed by the presbytery for that purpose,' remitted to an inspector 'to report how far the ground condescended upon is adapted, by facility of access, juxtaposition, and other circumstances of situation, to

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‘be a convenient grass glebe.’ The inspector having reported that the lands which were offered were conveniently situated for a grass glebe, the Court altered the interlocutor, turned the decree charged on into a libel, and of new remitted to the inspector ‘to ascertain what quantity of the grounds in question will be sufficient for a grass glebe to the minister, and to specify the precise situation and boundaries thereof.’ The inspector having reported that the lands were surrounded by an undivided common, and that there were certain difficulties thence arising as to the formation of a road to the proposed grass glebe, and Belshes having offered to guarantee a road to it, the Court, in respect thereof, allotted the proposed lands as a grass glebe, according to a report subsequently made by the inspector. Mr. Moore then reclaimed, and contended,—1. That as the grass glebe had been designed out of lands which were not kirk lands, it was not competent to compel him to accept of a grass glebe designed out of lands which were not so, and that those which had been allotted were not so convenient as those which had been marked off by the presbytery ;—and, 2. That as he had by means of the litigation, and with a view to the accommodation of Mr. Belshes, been deprived of the use of a grass glebe for the period of four years, he was entitled to a pecuniary consideration on that account. To this it was answered,—1. That the lands which had been allotted were proved by the report to be equally as advantageous in every respect as those which were claimed, and that therefore the demand to have those which were adjacent to the ancient manor-place designed as a glebe was not consistent with justice or equity ;—and, 2. That as Mr. Moore had been unsuccessful in supporting the decree of the presbytery, he was not entitled to a pecuniary consideration for the want of a glebe in the mean while. The Court adhered, and repelled the claim made for a pecuniary allowance.

*Charger's Authorities*.—(1.)—1663, c. 21 ; 1572, c. 48 ; 1593, c. 161 ; *Cunninghame*, Jan. 6. 1594, (5135) ; *E. of Galloway*, June 12. 1822, (ante, Vol. II. No. 873) ; *Dundas*, Feb. 8. 1808, (not rep.)—(2.)—*Connell on Par.* 382. 423.  
*Suspender's Authority*.—*Marshall*, June 20. 1605, (8495.)

G. DUNLOP, W. S.—MURRAY and INGLIS, W. S.—Agents.



J. OUCHTERLONY, Pursuer.—*Rutherford*.  
MAGISTRATES of ABERDEEN, Defenders.

No. 245.

*Process*.—Form of reclaiming notes under 6. Geo. IV. c. 180.

THE COURT, in a case where the record had not been made up according to the new form, refused to receive a reclaiming note, to which the summons and defences were not attached; and in another case they refused to receive a written note against a decree in absence.

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A. PEARSON, W. S.—T. DEUCHAR,—Agents.

Captain J. FERGUSSON and Others, Complainers.—*Bell—Shaw*.

No. 246.

R. BERRIE, Respondent.—*Moncreiff—Brown*.

*Process—Sequestration*.—A complaint to prevent a trustee acting on a resolution of a meeting of creditors, alleged not to have been carried by an actual majority, and directed solely against the trustee, dismissed as incompetent.

AT a meeting of the creditors on the sequestrated estate of John Fergusson, a resolution was proposed by one class that a particular creditor should be ranked without dispute, while another class moved that his claim should be rejected; and this latter motion was carried by an apparent majority of five votes in number. Berrie, the trustee, having intimated that he was of opinion that there was not a real majority, and that he meant to disregard this resolution, Captain Fergusson, and other creditors who had voted for the rejection, presented a petition and complaint directed against the trustee alone, and praying to have him ordained to act according to the resolution which had been carried, and craving the Court to remove him from his office, should he neglect to do so. To the competency of this petition it was objected,—1. That the creditors who were said to compose the minority, and who were the proper parties, were not called;—and, 2. That the prayer, as against the trustee, was not authorized by the statute. The Court unanimously dismissed the complaint, with expenses.

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The Court were of opinion, that the creditors who had voted for the resolution objected to, and who alone had any interest to support it, ought to have been called.

T. WALKER,—TENNENT and LYON,—Agents.

No. 247. J. PILLANS and Co., Suspenders.—*Moncreiff—Maitland.*  
T. PITT and MANDATORY, Chargers.—*Moss—W. Bell.*

*Freight.*—Circumstances in which consignees having taken delivery of a cargo in very bad condition, without warning the master that they would not pay the freight, were found not entitled to retain it on account of damage alleged to have been sustained from the master's signing a false bill of lading.

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Admiralty.

PILLANS and COMPANY, merchants in Leith, commissioned from Ryan and Company of Barcelona a quantity of bark, which was by them shipped on board the *Jason*, belonging to Pitt, under the superintendence of the master, Captain Eabbage, who granted a bill of lading bearing that the bark had been shipped 'in good order, and well conditioned,' and binding himself in usual form to deliver it 'in like good order, and well conditioned.' It appeared, however, from entries in his log, that part of it at least was 'both damp and moulded' at the time of shipping. During the voyage it became hot and settled down; and on its arrival at Fisherrow in the Frith of Forth, Pillans and Company protested against all concerned for any loss which they might sustain, and obtained the appointment of inspectors by authority of the Magistrates of Musselburgh. The inspectors reported that the bark at the top of the cargo was totally 'useless from having been shipped in a wet state, or perhaps from having been shipped as recently taken from the trees;' and that the remainder was 'damaged, rotten, and mouldy, which must have arisen from the cargo having been in a damp and damaged state previous to its having been put on board the *Jason*.' And they further declared 'the cargo to be totally unmerchantable,' and recommended it 'to be immediately discharged for the good of all concerned.' On this, Pillans and Company, without having recourse to any judicial proceedings to authorize the receiving the cargo for behoof of all concerned, and without stating to the master that they would not pay the freight, took delivery, and deposited it in the custody of a sworn broker at Leith, by whom it was sold, and the proceeds (which exceeded by £100 the amount of freight due) were paid over to Pillans and Company, who gave Eabbage, the master, as a piece of gratuitous kindness, £30 to subsidize him and the crew, according to their allegation; but, according to the averment of Pitt, in part-payment of the freight. Pillans and Company having, however, refused to make any further payment, Pitt, the owner, raised an action against them before the Judge Admiral, to which Pillans and Company pleaded in defence,—1. That they had not taken delivery in the true

mercantile sense of the terms; and that receiving and depositing it with a sworn broker, in the manner they had done, could not subject them in payment of freight.—**2.** That, in consequence of the false bill of lading signed by the master, they had sustained great loss, by making advances on the faith of it; and that they were at least entitled to plead compensation on the loss thus arising from the master's fraud, for which they had raised an action of damages against him and the owner; and they offered to consign the proceeds of the cargo in the hands of the clerk of Court. The Judge Admiral, 'in respect it is established by the documents in process that the bark in question was not shipped by the owners or master of the vessel, but by third parties—that no charge is made against the master of improper stowage—that it appears the defenders received delivery of the cargo, and sold the same by private bargain, and not by judicial authority, and paid a part of the freight—decerned in terms of the libel; and the Court, in a suspension, found the letters orderly proceeded.

**LEAD JUSTICE-CLERK.**—Notwithstanding the objectionable state of the cargo, Pillans and Company, instead of following up their protest by the proper steps to have it placed in cellars under judicial authority for behoof of all concerned, received delivery, and without any such authority deposited the cargo with a sworn broker; and having done so, I think it clear that they cannot now refuse payment of freight, on account of claims against the master and owner, however good these may be. It is contrary to every principle of law to take from the master what is his only security for payment of his freight, without thereby becoming liable for it. I do not go on the supposition that the £30 was paid as freight, so as to import an acknowledgment of liability. I look on that as merely an accommodation; but, on the principle that a master ought not to be deprived of the cargo on which he has a lien for the freight, except under judicial authority, I think that the letters should be found orderly proceeded.

**LORD GLENLEE.**—I concur in the Admiral's judgment. If the fact had been, that the cargo had been received by Pillans and Company after they had given due notification that they would take delivery only on condition that the freight should not be exigible, they might have been relieved from payment of it. But the protest here taken was of a totally different description from this; it was merely a protest against all and sundry for damages; it was no hint to the master that the freight would not be paid; and had the cargo not been received, he might have sold it, and paid himself out of the proceeds, which, had they been in publica custodia, would have remained liable to the master's claim. If it had come before

a Judge whether the master was obliged to deliver without payment, he would not have been held bound to do so.

**LORD FITZMILLY.**—I agree with the opinions already delivered. I do not go at all on the payment of the £50, but on this, that Pillans and Company took the cargo without warning the master that they would not pay the freight. The only difficulty arises from the terms of the bill of lading; that, however, is sufficiently explained, and the master could not in the circumstances have signed the only other form of bills of lading, which bears the quantity and quality to be unknown.

**LORD ALLOWAY.**—There is the greatest possible difference between the two forms of bills of lading commonly used—the one bearing the cargo to be in good condition, and the other, that the quantity and quality is unknown. Consignees are entitled to rely on the statement in the bill of lading; and if they make advances on the faith of the bill stating the cargo to be in good condition, their claim against the master is as clear as his for the freight. I also doubt very much whether there was here a proper delivery. I conceive the proceeds to remain in the hands of Pillans and Company for behoof of all concerned, and I think the protest put the master sufficiently on his guard. But, besides this, a summons for damages has been raised, and it amounts to what in the English Courts is called a cross plea, which removes all the difficulties arising from the English authorities founded on by the owner. I therefore think that this action should not be decided but along with that now raised by Pillans and Company.

**LORD GLENLEE.**—If the cargo is to be considered as not having been delivered, and the price is held to be in Pillans and Company's hands for behoof of all concerned, then the master's claim on the price for his freight must be judged of in the same way as if the cargo were still in his hands; and a claim of damages never could have forced him to part with the cargo.

*Charger's Authorities.*—Abbott, p. 229; Holt, 434; 1. Bell, 479.

PILLANS SCARTH, W. S.—JOHN TAIT, W. S.—Agents.

No. 248.

A. VEITCH, Pursuer.—*Dundas.*

J. TENNANT, Defender.—*Jameson.*

*Process*—6. Geo. IV. c. 120.—An amendment of a summons raised prior to the above statute ordered in respect it was not sufficiently positive and clear, and the pursuer subjected in the expenses thereby occasioned.

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VEITCH raised a summons against Tennant, which was dated and signeted on the 18th of May 1825, concluding for payment of certain rents; and the case having come for discussion in December thereafter, the Lord Ordinary appointed Veitch to

give in an amendment of his libel, 'in respect it appears that the grounds of the action, as set forth in the summons, are not sufficiently positive and clear,' and found him liable 'in the expense occasioned by the incorrect form of the summons.' Veitch reclaimed, contending,—1. That as the summons had been raised prior to the statute 6. Geo. IV. c. 120, the rules of it ought not to be applied;—and, 2. That the summons was sufficiently explicit. But the Court being satisfied that the summons was not sufficiently explicit, and that it was the duty of the Lord Ordinary to enforce the rules of the statute and act of sederunt, in so far as it was practicable to do so, adhered, and found additional expenses due.

J. TAYLOR,—J. BISSET,—Agents.

W. and A. M'ALLISTER, Advocators.—*A. M'Neill.*

No. 249.

MARK SPROT, Respondent.—*J. W. Davidson.*

*Landlord and Tenant*—*A. S. Dec. 14. 1756.*—A summons of removing, praying to have the tenant ordained 'to make payment of,' instead of 'to find caution for the arrears due,' held, notwithstanding, to fall under the *A. S. Dec. 14. 1756*, and not liable to be advocated without caution, 'but allowed on juratory caution in the special circumstances of the case.'

M'ALLISTERS, tenants of Sprot of Garnkirk, having fallen a year's rent in arrear, he raised a summons of removing before the Sheriff of Lanarkshire, praying that they should be ordained, not to find caution for, but to make payment of the arrears, and to find caution for the rent of the succeeding crops; and on failure, to remove in terms of the *A. S. Dec. 14. 1756*. The Sheriff pronounced an interlocutor, not in terms of the prayer, but as directed in the *A. S.*, ordaining them to find caution for the arrears, and for the five succeeding crops; and in respect of their failure to do so, he decerned in the removing. M'Allisters thereupon presented a bill of advocation, which was objected to, under authority of the *A. S.*, as being without caution. To this it was answered, that the prayer of the petition was not in terms of the *A. S.*, in so far as it prayed to have the tenants decerned to make payment of the arrears, instead of to find caution for them;—and that although the Sheriff's judgment was correctly in terms of the *A. S.*, he had no authority to proceed under the petition, and his judgment must therefore be subject to review by advocation, without finding caution, as in an incompetent process, not falling under the protection of the act. The Lords Ordinary Mackenzie and Medwyn passed the bill, the latter stating

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in a note, that he concurred in the 'interlocutor, because the conclusion of the summons does not seem to be in conformity with 'the A. S. 1756.' Sprot then reclaimed by note, and the Court recalled the interlocutor, and remitted to the Lord Ordinary on the Bills to pass on caution; or if the advocates were unable to find it, they being, as they alleged, in a state of poverty, in respect of the peculiar circumstances of the case, on juratory caution.

**LORD PITMILLY.**—I hesitate very much to pass this bill without caution. The A. S. is very general, and seems to apply to all cases of removal; and although the summons is incorrect, yet the Sheriff put the matter right by restricting the claim to caution, which was within what was demanded; and in so far as regards the prayer for removal, the summons craves less than it might have done, for it is only on failure to find caution for the five succeeding crops that it prays for decree of removal. The Sheriff's interlocutor is quite in terms of the A. S.; and although, perhaps, if the summons was grossly wrong, he might not be entitled so to correct it, yet the blunder here is not so important as to vitiate it.

**LORD ALLOWAY.**—I am much inclined to think the Sheriff's interlocutor right on the merits; but then there is a great deal in the objection which has moved the Lords Ordinary to pass the bill without caution. The A. S. authorizes a very summary proceeding, and I think its terms must be strictly complied with. The Sheriff should have made the party amend his summons, and the whole difficulty may yet be avoided by remitting to the Sheriff to appoint this to be done. I cannot at all accede to the doctrine maintained for the landlord in this case, that the Court are not entitled to look at the summons, and that it is quite enough to preclude the bill being passed without caution, that the process is one of removing. That is a doctrine which cannot be entertained for a moment. The Court are entitled to look at the summons, and see whether it is authorized by the A. S.

**LORD JUSTICE CLERK.**—This is a case of very considerable importance. The A. S. prescribes no precise form for a summons of removing. Undoubtedly, the landlord is not to demand any thing as to the removing not authorized by it; but I do not see that a summons would not be good, which merely narrated the arrears, and prayed for removal. If the facts are set forth, and removal craved, it does not appear to be necessary to conclude for every thing that the act authorizes the Judge to do. Certainly it must be a proper action of removal, and not one merely named so; but otherwise the act is precise, that no bill shall be passed without caution, and there is not a single case adduced where this has ever been done. Unless we are to investigate every case of removing without cau-

tion, 'I think we cannot pass this bill without it, although, as the parties are in a state of indigence, it may be allowed on juratory caution.

C. FISHER, —STUART and SPENCER, W. S.—Agents.

A. PETERKIN, Advocate.—*Jeffrey—Cockburn—Pyper—  
G. Napier.*

No. 250.

S. LANG and J. BARKIE, Respondents.—*Moncreiff—Rutherford  
—Robertson.*

*Process—Bill—Chamber.*—A marking on a bill by a Lord Ordinary, 'I incline to pass,' and signed by his Lordship, held to have passed the bill, so as to render a subsequent interlocutor of refusal by another Ordinary inept.

A bill of advocacy of a process pending before the Sheriff Court of Orkney having been presented during vacation without caution, it was laid before Lord Hermand, who wrote on it, without any date, 'I incline to pass,' and signed his name thereto. Under the erroneous supposition that it was a bill of suspension, which required two Ordinaries to pass it, the clerk transmitted it to Lord Robertson, who pronounced an interlocutor refusing the bill, against which the advocate reclaimed to the Court, on the ground that the bill having been passed by Lord Hermand's interlocutor, the subsequent one by Lord Robertson was inept. The respondent contended that the marking of Lord Hermand did not amount to a passing of the bill; but the Court found Lord Robertson's interlocutor inept and nugatory, and that the bill was passed by Lord Hermand.

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Lords Mackenzie and Robertson.

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C. M'ALLISTER, W. S.—RUSSEL, TOD, and HILL, W. S.—G. VEITCH,  
W. S.—Agents.

J. and W. DIXON, Suspenders.—*Moncreiff—Marshall.*

No. 251.

D. C. BUCHANAN, Changer.—*Forsyth.*

*Coal Interdict.*—A party having a reserved right to a tenth of the gross output beyond a fixed quantity of the coal on certain lands, the Court granted an interdict against the proprietor raising the coal by pits situated on other lands.

THE late Alexander Houston disposed to Robert Colt those parts of his barony of Rosehall called Hows, Dundyvan, &c., consisting of about 210 acres, with the coal thereof, 'declaring, &c. that in case the gross output of the coal within the said lands of Hows and others shall in the course of any one year, reckoning from January to January, happen to exceed 4000 tons, reckoning each ton at 20 cwt., that then I the said Alexander Houston, and my heirs and disponees whomsoever, shall in such year or years have right to one tenth part of the gross output of such coal

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'over and above the said 4000 tons in each year wherein the said output shall exceed the quantity of 4000 tons, and that free of all cost or expense whatsoever, and which condition is hereby declared a real burden on the lands; and the foresaid one tenth, or tenth load of the gross produce, is hereby specially reserved to me and my foresaids, free of all costs and expenses whatsoever.' In order to ascertain the exact quantity of coals annually raised, power was reserved to Houston, his heirs, &c. 'to keep a hillsman or overseer upon the said coal,' who should be entitled 'at all times to inspect the operations either below or above ground;' and Colt was taken bound to keep regular books of the gross output, and to give inspection of them to the overseer, who was empowered to take the oath of the persons keeping the books, with regard to their accuracy. These provisions were inserted in the infestment taken by Colt, who, about two months after the date of the conveyance, granted to Houston a declaration containing a more specific detail of his obligations; and in particular a clause binding him to set aside Houston's tenth 'at the pit-mouths on the said lands of Hows and others,' and granting liberty to Houston to keep a hillsman 'upon the coal-hills of the said lands;' which declaration was, as well as the infestment, recorded in the register of sasines. This reserved right was conveyed by Houston to Dixons, who also acquired right to about 100 acres of the lands; and that part of them called Dundyvan, amounting to about 70 acres, came into the hands of Buchanan, the charger, who was likewise proprietor of an adjoining property called Merryston, the coal of which was worked by a tenant, to whom Buchanan also granted a lease of the coal of Dundyvan. This person having commenced opening a communication under ground between the pits on Merryston and the coal of Dundyvan, Dixons presented a bill of suspension and interdict to have him prohibited from putting out the coal of Dundyvan 'by pits not within the said lands,' contending that Buchanan was bound to put out the coal on the lands of Dundyvan themselves, in order that their right to the tenth load might be effectually secured, which would not be the case, were it to be worked on lands to which they had no right of access, and along with other coal in which they had no property. The Lord Ordinary, while he passed the bill, refused the interdict; but on advising a reclaiming note, with cases, the Court altered his Lordship's interlocutor, and granted interdict as craved.

TOD and ROMANES, W. S.—G. DUNLOP, W. S.—Agents.



H. D. ERSKINE, *Defender*.—*D. of F. Cranstoun—Cunninghame.* No. 252.

Major G. F. ERSKINE.—*Moncreiff—Marshall.*

Mr. and Mrs. SMITH.—*A. Murray.*

Earl of BUCHAN and Others.—*Sol.-Gen. Hope—Alison.*

### Competing.

*Competition—Provision to Heirs and Children.*—A wife having, by her marriage-contract, vested her husband with the power of dividing the price of her estate among the heirs and bairns of the marriage; and the estate having been sold after her death, and the greater part of the price paid to the father; and he having granted bonds of provision to her younger children, and having entailed his separate estates on his eldest son, and made other provisions in his favour, and declared them to be in full of their respective shares of the price of the estate; and the father having died insolvent—*Held*,—1.—That, in a competition with the father's creditors, the children were not entitled to a preference to the extent of the price so paid to the father, except so far as it was distinguishable from his other funds;—and,—2.—That the power of division had been duly exercised, and that the children were entitled to rank *pari passu* with the other creditors for payment of these provisions.

THE late Honourable Henry Erskine, prior to his marriage with Miss Fullerton of Newhall, (which estate was then supposed to be validly entailed,) entered into a contract, by which, in contemplation of the marriage, he bound and obliged himself 'to provide and secure, and for that purpose to take the rights and securities of all lands and heritages, and moveable goods, &c., which he shall conquest or acquire, or succeed to, during the subsistence of the said marriage, to and in favours of himself and the said Christian Fullerton, in conjunct fee and liferent, and to the heirs and bairns of the marriage, whom failing, to his own nearest heirs and assignees whatsoever;—and declaring hereby, that all heritages and moveables which the said Henry Erskine shall have and be possessed of at the dissolution of this marriage, shall be understood to fall under this clause of conquest; reserving, however, to him a power of division among the children of the marriage, and to make a reasonable entail thereof.' On the other hand, Miss Fullerton, 'for securing the support and maintenance of the parties, and the issue of the marriage,' disposed (so far as within her power) all lands possessed by her, including Newhall, in favour of trustees, for various purposes; and particularly, 1st, for applying the rents of that estate towards the aliment of her and the family during the marriage, excluding the *jus mariti* of Mr. Erskine. 2d, 'If the pretended tailzie of the said estate shall be found ineffectual, and not to bar the said Christian Fullerton from selling the said lands and estate, then the said trustees are hereby declared to have power,

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bark.

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‘ if they see fit, to sell the same by public voluntary roup, &c., and  
 ‘ to grant the necessary dispositions to the purchasers, and to receive the price, and discharge the purchasers thereof, &c. And  
 ‘ the trustees, after paying the debts affecting the estate, and expenses attending the sale and management, shall be bound to lay  
 ‘ out the remainder of the price, so as, exclusive of the said Henry  
 ‘ Erskine’s *jus mariti*, the interest thereof may be applied in the  
 ‘ same way as the rents of the said estate are hereby before appointed to be applied; and that the said Christian Fullerton and  
 ‘ Henry Erskine, and the survivor of them, in case the said estate  
 ‘ is found to be free of the said entail, or sold, shall have power to  
 ‘ appoint and ascertain the shares which the children of this marriage shall have of the said estate, or price thereof, after the death  
 ‘ of the survivor of them; and shall also, if they choose so to do,  
 ‘ have power to cause the said trustees settle the same, or price thereof, on the heirs of the marriage, under such conditions,  
 ‘ clauses irritant and resolute, as they or their parents shall see  
 ‘ fit.’ And, lastly, it was declared that ‘ the foresaid provisions  
 ‘ conceived in favours of the children of the marriage are to be  
 ‘ in full satisfaction to the said children of all legitim, bairns’ part  
 ‘ of gear, portion natural, executry, or whatever else they might  
 ‘ ask or claim through the decease of the said Henry Erskine  
 ‘ and Christian Fullerton, or either of them, in any manner of  
 ‘ way whatever, excepting always their succession in competition  
 ‘ with collaterals, as accords of the law.’

The trustees did not act; and Mrs. Erskine having died, leaving two sons and two daughters, her estate, which was found not to have been validly entailed, was sold to the Earl of Kellie for £34,000; and Henry David Erskine, the eldest son, made up titles to it, and conveyed it to the purchaser. The greater part of the price was paid to Mr. Erskine, who executed various bonds of provision in favour of his younger children,—some of them of an absolute nature,—some in addition to those already provided;—others depending on the contingency of his succeeding to the titles and estates of the Earl of Buchan,—and others on that of the succession of his heir to them. These deeds in general proceeded on the narrative, that, by the contract of marriage, ‘ the said  
 ‘ estate of Newhall, and the conquest to be acquired during the  
 ‘ marriage, were settled on the children to be procreated of the  
 ‘ marriage, in such proportions as we should appoint during our  
 ‘ joint lives, or as the survivor of us should so appoint after the  
 ‘ death of either of us;’ and that the sums thereby provided should be ‘ in full of all claim of conquest, executry, legitim, and  
 ‘ bairns’ part of gear, competent to them against me under the

‘said contract of marriage, or otherwise, in any manner of way  
 ‘whatever, excepting what I may think fit to bestow of my own  
 ‘good will allenerly;’ and it was declared by Mr. Erskine to be  
 thereby his ‘intention to make the division, which I am en-  
 ‘titled to make in virtue of the said marriage-contract, in such  
 ‘way and manner as that my eldest son, Henry David Erskine,  
 ‘shall succeed to the whole estates and conquest settled by the said  
 ‘contract of marriage, under the burden of the above provisions.’  
 Those in favour of the daughters were granted on occasion of  
 their marriage.

By a trust-deed and settlement in 1809, proceeding on the nar-  
 rative of the contract of marriage, that ‘since the death of the  
 ‘said Mrs. Christian Fullerton, the said lands of Newhall, and  
 ‘others which belonged to her, have been sold, and the price  
 ‘thereof stands as a surrogatum for the same, subject to the same  
 ‘destination and powers belonging to me, the said Henry Er-  
 ‘skine,’—that he had made the above provisions in favour of his  
 younger children, and an entail of his lands in favour of his eldest  
 son, he conveyed his estates to trustees for various purposes. In par-  
 ticular, he declared that the object of the trust was, first, to pay off  
 the debts owing by him, and for which the entailed lands might  
 be attached; secondly, to pay certain provisions to his then wife,  
 and also those he had granted in favour of his younger children;  
 and, thirdly, to provide an annuity to his eldest son, equal to one-  
 third of the rents of the entailed lands, till they should be cleared  
 of debts, and to give him the possession of the house, offices,  
 and adjacent grounds of Ammondell, free of rent, and his house-  
 hold furniture, &c. in property. The deed then concluded by  
 declaring, that the ‘provisions hereby, and by the said deed of  
 ‘entail, (executed by me of even date herewith,) conceived in  
 ‘favour of the said Henry David Erskine, are to be in full con-  
 ‘tentation and satisfaction of his share of the said estate of New-  
 ‘hall and others, and price thereof, which belonged to the said  
 ‘deceased Mrs. Christian Fullerton, his mother, and conquest of  
 ‘the marriage between me and the said Mrs. Christian Fullerton,  
 ‘and of all executry, legitim, and bairns’ part of gear competent  
 ‘to him against me under the said contract of marriage between  
 ‘me and his said mother, or otherwise, in any manner of way  
 ‘whatever; and which provisions hereby, and by the two bonds  
 ‘of provision before mentioned, conceived in favour of the said  
 ‘Henrietta Erskine, and George Francis Erskine, are also to be  
 ‘in full contentation and satisfaction of their shares of said estate  
 ‘of Newhall and others, and price thereof, and of said conquest,  
 ‘and of all executry, legitim, and bairns’ part of gear competent to

‘ them, or either of them, in virtue of said contract of marriage, or otherwise, in any manner of way whatever, excepting what further I may hereafter think fit to bestow of my own good will, ‘ allenarly.’ This deed, and the various provisions, were approved of by the eldest son, by a relative deed to that effect.

Soon after Mr. Erskine’s death, the balance of the price of Newhall, which had remained in the Earl of Kellie’s hands, was paid to the trustees; but it being found that Mr. Erskine’s means were not adequate to pay his debts, including the provisions to his widow and children, and certain questions having arisen between the children and the stranger creditors, and between the children themselves, the trustees brought a process of multipointing to have them settled.

By the eldest son it was maintained,—1. That the price of the estate of Newhall was a separate fund belonging to him by virtue of the disposition contained in the contract of marriage in favour of ‘ the heirs and bairns’ of the marriage; and that although the greater part of it had been paid to Mr. Erskine, yet it was proved by his trust-deed that the price was held by him as a surrogatum for the lands, and had been employed in the purchase of others, and therefore was not attachable by any of his creditors, or liable to be divided among them;—and, 2. That the provisions to the younger children were not specifically appointed to be paid out of that price, and therefore they were not entitled to compete on it with him.

By the younger children it was contended, that although they agreed with the eldest son that the price formed a fund separate from the proper estate of Mr. Erskine, and on which his creditors could not rank, yet he had duly exercised his power of division, and that they must be ranked on it, both for their absolute provisions to the effect of recovering immediate payment,—and for those of a contingent nature, to the effect of having a sum set aside to meet them, in the event of the contingencies taking place.

By the Earl of Buchan and others, who were personal creditors, it was maintained,—1. That as the price of Newhall had been paid, and lent to Mr. Erskine, and had been merged with his other funds, the children were not entitled to insist on being ranked on it, to the exclusion of the other personal creditors; but that they, together with these creditors, must be ranked equally on the general fund in medio;—and, 2. That the younger children were not entitled to compete with them, so far as regarded the additional and contingent provisions, neither of which had been made in virtue of the obligation in the contract of marriage, and therefore conferred no jus crediti. The Court, on the

report of the Lord Ordinary, found ' that the balance of the price of Newhall, paid by the Earl of Kellie subsequent to Mr. Erskine's death, forms no part of the fund in medio, in a question between the creditors and the children of the late Henry Erskine, but belongs to the children, subject to any claim of retention by Lord Kellie or Mr. Erskine's trustees, which, and all objections thereto, are hereby reserved: That Mr. Henry David Erskine, and the younger children of the late Mr. Erskine for their absolute provisions, are onerous creditors of Mr. Erskine for that part of the price of Newhall which was paid to Mr. Erskine during his life, and are entitled to be ranked therefor upon the fund in medio *pari passu* with the Earl of Buchan and Earl of Kellie, and the other onerous creditors of Mr. Erskine, and with Mrs. Erskine, the widow of Mr. Erskine, for her provisions in her contract of marriage; and rank and prefer them accordingly in this multiplepointing; but declared that they would hear parties further on the additional and contingent provisions claimed by them.'

*H. D. Erskine's Authorities.*—(1.)—Fairservice, June 17. 1789, (2317 and 14486); Dollar, Dec. 4. 1792, (13008); Duncan, Feb. 9. 1813, (F. C.); Cockburn, Dec. 15. 1725, (15129.)

*Major Erskine's Authorities.*—(1.)—Stewart, Jan. 29. 1678, (3052); Scott, Feb. 1684, (12843); M'Dowall, Feb. 1727, (12845); Wilson, Dec. 1. 1769, (12844); Lamont, July 30. 1776, (App. No. 1. Prov. to Heirs, &c.)

*Mr. Smith's Authorities.*—(1.)—Stair, 616; 1. Bell, 202; Paley, 50; Somervilles, Feb. 22. 1805, (No. 3. Ap. Pers. and R.); Carleton, Nov. 21. 1752, (9141); Preston, March 6. 1805, (No. 2. Ap. Pers. and R.)

HUNTER, CAMPBELL, and CATHCART, W. S.—J. and C. NAIRNE, W. S.—YOUNGS, AYTOON, and RUTHERFORD, W. S.—A. MONYPENNY, W. S.—Agents.

A. WILSON, Pursuer.—*Greenshields*—*Murray*.

No. 253.

D. S. THRESHIE, Defender.—*Jeffrey*—*Gillies*.

*Society—Company Property.*—Circumstances in which property purchased by partners in a joint adventure, and used for the purposes of the concern, held not to be company property.

KID and WILSON, partners in a fish-curing concern, were proprietors of an area on which they had erected buildings used by them for the purposes of the trade, the disposition to which was taken *pro indiviso* to them, their heirs and assignees. Upon Kid's bankruptcy, Threshie, who was appointed trustee on his sequestrated estate, having claimed one-half as the individual property of the bankrupt, Wilson raised an action to have it declared,

Jan. 17. 1826.

2d DIVISION.

Lords Pitmilley  
and Mackenzie

B.

‘ that the right of the said property conveyed to the pursuer  
‘ and the said David Kid was intended to vest the subjects in  
‘ themselves as copartners, and that the said property is still held  
‘ by the pursuer and the said David Kid, in trust for behoof of  
‘ the said company, and that the whole buildings erected thereon  
‘ are the joint property of the said company, and as such are  
‘ liable for the debts of the said company;’ and further to have it  
declared that Kid’s trustee had only an interest in the premises,  
‘ after the pursuer’s claim as a partner, and his whole superad-  
‘ vances on the property itself, are fully satisfied and paid.’ The  
Lord Ordinary allowed a proof, from which it appeared that in  
1817 Kid engaged with Wilson, and Muir his uncle, in a concern  
for fishing and curing herring, and that he continued to carry on  
the same trade with Wilson alone during the three succeeding  
years,—that Kid had subscribed accounts, and had made entries  
in them, where the concern was denominated ‘ The Company’  
and ‘ Fishing Company;’ and that, in his petition for sequestration,  
it was stated that he was ‘ engaged in a copartnership’ with  
Wilson, which was there also styled by him a company. It  
further appeared that the negotiation for the purchase of the  
property had commenced while Muir was a partner of the  
concern, and had been conducted in his individual name, and he  
swore that the offer he made was for behoof of the company;  
but he also stated that he had no interest in it, as he in-  
tended shortly to retire. In the disposition Kid and Wilson  
were designed merchants in Dunbar, while Kid’s individual de-  
signation was fish-curer in Leith. On the other hand, it was  
proved that the concern had never been known by any firm—  
that the partners were not bound to each other for any specific  
period—that Muir had been a partner for a year after the con-  
veyance of the property, while it was admitted that he had no  
interest in it—that Wilson had taken infestment by himself on  
the one-half pro indiviso, and that he had granted an heritable  
bond over it in his own name, and for his own debt. On this  
proof Wilson contended, 1. That the subjects formed a company  
property; and, 2. That, at any rate, if only a pro indiviso pro-  
perty, he had a right of retention for any sums expended: On  
the other hand Threshie maintained, 1. That the subjects were  
the pro indiviso property of the two individuals; and, 2. That  
the question of retention did not fall under the conclusions  
of the summons. The Lord Ordinary found, ‘ that the pur-  
‘ suer has failed to establish that the subjects in question be-  
‘ longed to him and Kid as a company, and for behoof of the co-  
‘ partnership or joint adventure in which they were engaged;

'and, on the contrary, found it sufficiently instructed that these subjects were purchased and held by the pursuer and David Kid as individuals, of which each had a pro indiviso share at the period of Kid's bankruptcy;' and his Lordship accordingly appointed the trustee. The Court adhered, reserving, however, 'to the pursuer all claims he may have against the said property or otherwise, and to the defenders their defences thereto, as accords;' and, on advising a reclaiming petition with answers, they again adhered.

**LORD PITMILLY.**—The only conclusion which we can consider under this summons, is that for having the subjects in question declared company property. The claims for retention do not fall within it, and will require a new action to have them determined. The foundation of the pursuer's case is, that the concern in which he and Kid were engaged was a regular partnership; but they were in fact merely joint adventurers from year to year, without any regular copartnership. If it was a partnership concern, how is Muir excluded from any share in the property, the titles to which are taken to Kid and Wilson pro indiviso? The pursuer has shown his own understanding as to the nature of the right, by taking interest pro indiviso, and granting an heritable security for his own private debt. All the evidence goes to support the interlocutor; and although the pursuer may have claims for his advances, he is not in shape to establish them in this action.

**LORD JUSTICE-CLERK.**—I am of opinion that, under the reservation which has been made, the interlocutor must be adhered to. The concern in which the parties were engaged was not a general partnership, but an isolated joint adventure, which might have been put an end to at the expiry of each year. It is no doubt true that the property was fitted up for the use of the concern; but that it did not form part of the stock of the adventure appears from the titles—from Muir, who was a partner for some time after the purchase, having confessedly no interest in it—and from the pursuer borrowing money on his pro indiviso half for his own accommodation. The law, as laid down in the petition, is perfectly correct; but it does not apply to the species facti of this case.

**LORD ROBERTSON** entirely concurred.

**LORD ALLOWAY.**—I entertain great doubts of the correctness of the interlocutor, although I agree that this was a joint adventure, and not a regular copartnership; but the same principles apply to both. Two out of the three cases founded on by the pursuer arose out of joint adventures, and the circumstances here are similar, but much stronger than those in the two cases of Crooks and of Murray. Undoubtedly, if Muir had continued a partner, it would have been impossible to have held the subject in question to be company

property, if he had no interest in it; but he was about to retire at the time of the purchase, and left the company shortly after. The price of the property, however, and of erecting the buildings, which were expressly for the use of the concern, it is now offered to be proved, was taken from the proceeds of the business; and if this be so, it is a much stronger case than any of those founded on. As to the titles, they of course could not be taken to the company; and the only way in which partners can raise money on company property, is by securities granted in their own name; and it is alleged that the sum borrowed by Wilson here was applied to the company concerns.

**LORD GLENLEE.**—I have no sort of doubt that, so far as it extends, a joint adventure has the same legal consequences with a regular partnership; so that if it is once ascertained that any thing forms part of the joint adventure stock, the same rules must apply to it. But when the question is, whether a certain heritable property is in fact part of the stock, it makes a considerable difference, whether the concern is of the nature of a joint adventure, or a copartnership; because it is not at all likely that parties would purchase heritage, to form part of the stock of an adventure which has no current existence. It is a very different case where the property is not for behoof of the joint adventure, but is itself the subject of it, as was in fact the case of Murray, where the parties were joint owners of houses for the purpose of trading in them, and making profit. It was not held there, that the houses were part of the stock of the porter concern of which the Murrays were partners, but that they themselves formed the subject of a joint stock adventure. This question, however, is not raised in the present summons; and I cannot hold that the property here was meant to be thrown into the stock of the fish-curing concern, which is the only question brought before the Court by the libel, as it merely concludes to have the property declared to be part of that company's stock. All other claims are saved by the reservation.

*Purser's Authorities.*—Crooks, Jan. 29. 1779, (14596); Murray, Feb. 5. 1805, (F. C.); Sime, March 1. 1804, (F. C.); Montague on Partnership, 101; 1. Cooke, Bank. Law, 556; Forrester v. Hall, 5. Vesey, 809; Thornton v. Dickson, Brown's Cases, 199; Gow on Partnership, 48.

**CAMPBELL and BURNSIDE, W. S.—D. S. THRESHIE, W. S.—Agents.**



J. C. BLAIR, Advocate.—*Moncreiff—Rutherford.*

No. 254.

J. LYALL, Respondent.—*Jeffrey—Miller.*

*Landlord and Tenant—Res Judicata—Competent and Omitted.*—A tenant of a piece of ground in natural pasture at entry, the term of removal from which was stipulated to be Whitsunday, having, under a permission in his lease, brought it into cultivation during the currency, and having acquiesced in the refusal of a bill of suspension of a decree of removing as at Whitsunday—Held,—1.—That under the lease he had no right to a way-going crop;—2.—That the refusal of the bill of suspension formed res judicata as to his claim, so far as founded on the lease;—and,—3.—That he could not support this claim by a decree-arbitral, on which he had omitted to found in his bill of suspension.

Jan. 18. 1826.

2d Division.  
Lord Cringletie.  
M'K.

BLAIR was tenant of the farm of Lundin, belonging to Lyall, under a lease for fifty-seven years from Whitsunday 1767 as to the houses and grass, and the separation of the crop as to the arable land. He likewise held a lease of an adjoining piece of ground called Bowie's planting, consisting of about thirty acres, originally under wood, part of which was still standing. It had never been cultivated, but remained in rough grass, as the trees had been cut down and removed from it. This lease was not granted till some years subsequent to that of Lundin, but its term of endurance was made thirty-five years from Whitsunday 1789, which was declared to be the term of entry, so as to expire at Whitsunday 1824, in which year the lease of Lundin also came to an end. The first term's rent was declared to be payable at Lammas 1790 'for the year immediately preceding, and so on at Lammas 'yearly during the currency of the tack.' The tenant was empowered to occupy and labour Bowie's planting at pleasure, and in the course of the lease he brought it into cultivation as arable land. Some disputes having arisen, towards the close of these leases, between the landlord and tenant as to the mode of cropping, they entered into a submission, by missives which mentioned both farms, as to the quantity of grass to be left, and the mode of cropping to be followed for the last year. The arbiter pronounced a decree apparently applicable to both, fixing that certain fields, which did not include any part of Bowie's planting, should be left in grass, and others cropped in a particular way; and declaring that the rest of the farm should be cropped in such a manner as the tenant should think proper. In December 1823 Lyall served Blair with a summons, which concluded for his removal from Lundin at Whitsunday and the separation of the crop 1824, and from Bowie's planting at Whitsunday. Decree was allowed to pass in absence; but Blair subsequently presented a bill of suspension, on the ground that he was entitled to a way-

going crop from Bowie's planting, from which he would be precluded by the decree of removal obliging him to quit the possession at Whitsunday,—but he did not found on the submission and award proceeding thereon, as giving him any right to continue in possession till the separation of the crop. Lord Eldin refused the bill; and Blair did not petition against his judgment. In February thereafter Lyall presented a petition to the Sheriff of Forfar, narrating that he was informed of Blair's intention to plough about twenty acres of Bowie's planting, and praying for an interdict, and that it should be found that 'he had no right to plough up, or bring under crop for the ensuing season,' any part of this piece of ground. The Sheriff found 'it admitted by the defender, that the park or enclosure of which he is tenant consisted, at the date of the lease, of natural grass partly covered with wood, and that it was not converted into arable land for fourteen or fifteen years thereafter; and as the lease bears that the tenant was to possess the subject let to him only for the space of thirty-five years from and after the term of Whitsunday 1789, and takes him bound to pay the first year's rent at Lammas 1790 for the year preceding,—and in respect that a decret of removing from the possession was pronounced against him by this Court on the 9th December last, decreeing him to remove at Whitsunday 1824, and that a bill of suspension against that decret, upon the ground that the defender was entitled to an away-going crop, has been refused by the Lord Ordinary on the bills,' granted the interdict. Blair thereupon presented a bill of advocacy, which was passed by Lord Eldin, 'in respect of the agreement between the parties;' and his Lordship's interlocutor having been adhered to by the Court, the expedite letters came to be discussed before Lord Cringletie. Blair contended,—1. That under his lease, which empowered him to cultivate Bowie's planting, he was entitled to a way-going crop;—and, 2. That this matter had been regulated by the reference and award, which he alleged to apply to both his farms. Lyall, besides disputing, that Blair had right to a way-going crop under his lease, or that the reference and award was meant to include Bowie's planting, maintained, in answer, that the first of these pleas was proponed and repelled in the bill of suspension of the decree of removing refused by the Lord Ordinary, which formed a *res judicata*; and that the second was competent, but omitted. The Lord Ordinary, 'in respect of the final interlocutor ordaining him to remove at Whitsunday 1824, found the advocator not entitled to an out-going crop in that

'year,' and remitted simpliciter to the Sheriff; and the Court adhered.

**LORD GLENLEE.**—Independent of the plea founded on the decree-arbitral, the tenant has no pretence for claiming a way-going crop. There may undoubtedly be cases where, although Whitsunday be the only term of removal stipulated in the lease, the tenant may be entitled to a way-going crop, as where the preceding tenant had reaped a crop after his entry. But here, at Blair's entry, the land was in grass, and he has reaped as many crops as there were years in his lease; and I can see no ground under the terms of the lease for allowing him a way-going crop. The only difficulty arises from the decree-arbitral; but if that is to be taken into consideration, it would require a great deal more investigation before determining its effect,—for I greatly doubt whether it was intended to do more than regulate the crops which the tenant was by his lease entitled to take. At present, however, we are not called on to consider the decree-arbitral at all, the landlord being in possession of a subsisting decree of removing, confirmed by the refusal of the bill of suspension, in which no notice was taken of the decree-arbitral; and while this decree of removal stands, we cannot allow the tenant to retain possession so as to reap a way-going crop.

**LORD ROBERTSON.**—Under the terms of the lease it is clear that the tenant was not entitled to a way-going crop; and I cannot consider the reference and award as meant to put an end to the clear contract of parties under the lease. The interlocutor, besides, is well founded, on the ground that the decree of removal is final.

**LORD PITMILLY** concurred.

**LORD ALLOWAY.**—It is only competent here to decide the *res judicata* fixed by the Lord Ordinary; but this must be founded on the opinion formed as to the merits, and I confess that I entertain great doubts on the subject. The principle, it appears to me, on which a way-going crop is allowed, is not that the out-going tenant has reaped a crop after the new tenant's entry, but that the land would otherwise lie waste, as, till the term of removal at Whitsunday, which is beyond the sowing season, no one but the tenant is entitled to come on the lands to sow a crop; and if the landlord empowers the tenant to cultivate land, which is in grass at entry, it must be judged, at the expiry of the lease, as if it had been arable from the beginning, and a way-going crop will be allowed at common law. Nor does it follow from this, that the tenant will reap an additional crop; for, if muir or woodland is rendered arable, the grass must be lost to the tenant for at least one year, and frequently for more. If, then, the tenant was entitled to a way-going crop under his lease, the decree of removing would not preclude it, as it must be in exactly the terms of the lease itself. Such a

decree the tenant could not validly oppose, nor would the reference and award have been a good plea to propound against it, as in this view it could not deprive the tenant of his right to a way-going crop. The refusal of the bill of suspension, therefore, was not a decision on this point, as in this view it was unnecessary, and might have been refused as unnecessary, without the Lord Ordinary intending to decide that a way-going crop could not be allowed, which I conceive to have been competent, notwithstanding the decree of removal. Besides, I entertain doubts how far the refusal of a bill of suspension forms a *res judicata*, and whether it does not leave matters in the same state as if never presented. In regard to the decree-arbitral, if we are to get to the consideration of it, I conceive that it applied to both farms, and has settled the question in favour of the tenant.

**LORD JUSTICE-CLERK.**—If the question on the merits were open, especially regarding the decree-arbitral, there would be a great deal of difficulty, and further investigation would be necessary before determining whether it extended to both farms. But I do not consider that we can now go into this, as the bill of suspension brought under review of the Court the very question whether the tenant was entitled to a way-going crop, and the refusal of the bill forms a decision on that point; while, as to the plea founded on the reference and award, it clearly falls under the rule of competent and omitted.

G. HOGARTH, W. S.—T. DEUCHAS,—Agents.

No. 255.

R. CHRISTIE, Pursuer.—*Skene*.

J. REID, Defender.—*Moncreiff*—*G. Napier*.

**Cautioner.**—A bond for a cash-credit being signed by a company firm and the two individual partners, and also by another party and the principal, for whose behoof the credit was granted—Held, in a question of relief, that there were only two cautioners, and that the individual partners and the company were not liable each in a separate share, but together only in one single share.—2—One cautioner, after the known embarrassment of the principal's affairs, and after consultation as to measures for the benefit of all, not entitled to apply indefinite payments in extinction of his private claims.

Jan. 19. 1826.

2d DIVISION.  
Lord Mackenzie.  
F.

In September 1818, Douglas, a merchant in Leith, applied to the British Linen Company for a cash-credit by the following letter :—‘ Being desirous to obtain a cash-account with the British Linen Company to the extent of £1000, I shall be obliged by your laying my request before the Directors. I would propose for my security my brother-in-law John Reid, Esq., and Messrs. William Kerr and Robert Kerr, merchants in Leith.’ The Bank having agreed to allow him a credit to

this extent, a bond was executed, which proceeded in the following terms:— We, William Douglas, merchant in Leith, John Reid of Gogar Bank, William Kerr and Sons, merchants in Leith, William Kerr, merchant there, and Robert Kerr, merchant there: Whereas a Court of Directors of the British Linen Company have agreed to allow us a credit, upon an account-current to be kept in the books of the said company in name of me the said William Douglas, to the amount of £1000 sterling, upon our granting these presents: Therefore we, the said William Douglas, John Reid, William Kerr and Sons, William Kerr and Robert Kerr, bind and oblige ourselves, conjunctly and severally, our heirs, executors, and successors whatsoever, to content and pay,' &c.; and the bond was subscribed by these several parties. On this account Douglas continued to operate till December 1819. It appeared that; in the preceding June, the parties had been aware that Douglas was in embarrassed circumstances, had taken some joint measures, and had communications with each other on the subject, the result of which, as alleged by the pursuer, was an understanding that all the cautioners in the cash-credit were to apply the sums received from Douglas in mutual relief of this obligation. Douglas having become bankrupt in the course of 1820, the balance due on the bond was paid up by Reid and by Kerr and Sons, who, after some discussion, entered into a submission of their claims of relief against each other; but this having been allowed to expire, and Kerr and Sons having been sequestrated in 1822, Christie, the trustee on their estate, raised an action of count and reckoning against Reid, in which he maintained, inter alia, 1. That Reid was liable in one-half of the balance on the cash-credit, because, although the names of the individual partners of Kerr and Sons were inserted in the bond for the security and convenience of the Bank, there were in truth only two cautioners, viz. Reid on the one hand, and Kerr and Sons on the other; and, 2. That Reid was bound to communicate, in extinction of the bond, two sums received indefinitely by him from Douglas in July 1819, on the ground that the parties were in the situation of distressed cautioners, and that there was an understanding between them, consequent on the knowledge of Douglas's insolvent circumstances, that each was to apply any sums received from Douglas in extinction of the bond; in proof of which understanding, he referred chiefly to Reid's statement in the submission. In defence Reid pleaded, 1. That the terms of the bond were precise, and that under them there were besides Douglas four separate parties bound, viz. himself, the company as a separate party, and the two partners as in-

dividuals, and that, in a question of relief, each was only liable for a fourth share; and, 2. That in 1819, when he received the payment in question, Reid owed him a large debt, independent of the obligation under the cash-account, which was not brought to a close for some time thereafter; and that he was entitled to apply the payment in liquidation of this, which was the only debt actually due at the time; and he denied the existence of any such understanding as that alleged by Christie. The Lord Ordinary repelled the defences on these points, and the Court adhered, reserving to Reid 'any claim which he may have for a proportional allocation of the sums in dispute towards any debt due to him that may be instructed, and to the pursuer to be heard in his answers to such claim.'

**LORD ALLOWAY.**—I have considerable doubts as to the first point; but, on the whole, I think the Lord Ordinary's construction is right. It has long been the practice of the British Linen Company, and, I believe, of all other Banks in Scotland, never to take a bond of caution signed by a company firm; for, as this is not a transaction in the way of business, the individual members might deny their liability, unless they individually subscribed the bond; and I rather think that the introduction of the individual partners here must be considered as merely for convenience and greater security to the Bank. As to the other point, it resolves into a question of evidence; and I think it is clearly made out, that so early as June 1819, both parties held themselves in the situation of distressed cautioners; and this being the case, the law is clear, that each was bound to communicate all he recovered from the debtor in extinction of the joint obligation.

**LORD GLENLEE.**—Reid is not entitled to keep the payments made to him entirely to himself; but it may still be a question, whether he is not entitled to apply part of them to the extinction of his own private debt, as being a fund divisible among the creditors of Douglas generally, unless there was complete evidence of the existence of a treaty with Kerr, which would have obliged Reid to communicate all he received from Douglas in relief of their joint obligation; and as I think there is scarcely sufficient evidence of this, there may be room for a reservation to this effect, if it is not to be considered still open under the Lord Ordinary's interlocutor. In regard to the terms of the bond, I incline to think that the company was alone intended to be the cautioner, and that the individuals bound themselves, in a question among the cautioners, merely as partners of the company.

**LORD ROBERTSON** entertained doubts as to the correctness of the Lord Ordinary's interlocutor.

**LORDS JUSTICE-CLERK and PITMILLY** concurred in the interlocutor, but did not object to the reservation proposed by Lord Glenlee.

**T. DARLING,—J. T. MURRAY, W. S.—Agents.**

**A. B. M'DONNELL, Pursuer.—Jeffrey—Riddell.**

**No. 256.**

**R. G. M'DONALD, Defender.—Thomson—Murray—Buchanan.**

*Jurisdiction—Lyon Court—Process.*—The Court dismissed, as incompetent, an action of reduction of a matriculation of arms, the party pursuer not setting forth that he had right to the arms in question.

M'DONNELL of Glengarry brought an action, concluding for reduction of a matriculation of arms recorded in the Lyon Court of date 9th August 1810, and bearing to be the arms of 'Reginald George M'Donald of Clan Ranald, Esq. captain 'and chief of Clan Ranald,' on the grounds that 'the arms 'blazoned are not such as the defender is entitled to bear,' and that the defender 'is not chief of Clan Ranald.' In the summons the pursuer designed himself 'of Glengarry,' and 'heir-male in general duly served and retoured to Æneas Lord 'M'Donnell of Arros, who was recognised by the King's Commissioner and the Privy Council, in 1672, as chief of the name 'and clan of M'Donald,'—and stated that the matriculation sought to be reduced was to his 'great hurt and prejudice;' but he did not set forth that he was the chief of Clan Ranald, or that he was entitled to bear the arms which had been matriculated as the ensigns armorial of the defender; and he himself had, in 1797, matriculated arms essentially different. Besides defences on the merits, that the arms matriculated were those which had been borne and matriculated by the defender's ancestors for centuries, it was pleaded in limine,—1. The action is totally incompetent before this Court;—2. The pursuer has no title to pursue such an action, even according to the showing of his own summons;—3. The action, as laid, does not involve any point in which the pursuer, or any one else, can have a legal interest cognisable in this form.' The Lord Ordinary, 'before answer as to the pursuer's title, made avizandum with the cause to the Lords of the Second Division of the Court, and ordained parties' procurators to prepare informations thereon as to the competency of the action in this Court.' Informations were accordingly lodged, in which the pursuer pleaded,—1. That, prior to 1672, the Lyon had no jurisdiction in matters of arms, the cognisance of which belonged solely to the Privy Council, and the Supreme Civil Court, which had also the power of reviewing all the

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proceedings of the Lord Lyon;—2. That the act 1672 neither made the jurisdiction of the Lyon Court privative, nor took away the power of review of this Court;—and, 3. That, at all events, this Court undoubtedly had jurisdiction in all competitions of arms, as they in reality raised questions of patrimonial interest. On the other hand, it was maintained for the defender, that the act 1672, by declaring that the Lyon record should ‘be respected as the true and unrepealable rule of all arms and bearings in Scotland,’ conferred a privative jurisdiction in such matters on the Lord Lyon; and that even if this Court had jurisdiction in competitions of arms, the pursuer did not set forth his right to those matriculated by the defender. The Court dismissed the action as incompetent.

**LORD ROBERTSON.**—The question taken to report is merely in regard to the jurisdiction of this Court, in determining which it is necessary to consider the nature of the Lord Lyon’s powers. These relate to two separate and distinct matters,—one regarding messengers, and the other, which we have to do with here, relating to armorial bearings. The power of granting ensigns armorial is part of the royal prerogative, but every thing belonging to that power has been given by sundry statutes to the Lord Lyon. His power to grant new armorial bearings is merely discretionary and ministerial, and with that this Court cannot interfere. But if the Lord Lyon should grant to one person arms which another is entitled to bear, and should refuse to give redress, there could be no doubt of the jurisdiction of this Court to entertain an action at the instance of the party to have his right declared, as this would involve a question of property, which a right to bear particular ensigns armorial undoubtedly is. But a question remains behind, whether the summons in the present case is so conceived, that it could be entertained by any Court. The pursuer had his own arms matriculated in 1797, and he does not say that they are erroneous; nor does he set forth in his summons that he is the true chieftain, or that he has right to the arms of the defender. There is no conclusion in favour of his right to these arms; so that, were he to obtain decree in terms of his libel, he could take nothing under it. Popular actions are unknown in our law, and no one can bring an action to take from another what he himself has no right to. I also doubt whether this Court has any original jurisdiction in matters of this kind, and whether it was not necessary for the pursuer to have applied to the Lord Lyon for redress, and on that being refused, to bring the judgment under review of this Court.

**LORD GLENLEE.**—There are in this case separate defences as to the competency and as to the title, and the Lord Ordinary’s interlocutor is before answer as to the title. The only question, therefore, properly before us, is the general one, whether this Court is compe-



tent to entertain an action as to the right to armorial bearings; and we cannot go into the other defences, that the pursuer has no title or interest, or that his libel is not properly laid. In the case of *Murray* it was found that the Lyon's jurisdiction was not privative, and this implies that the Court of Session has such a jurisdiction;—that a question of this nature, while depending in the Lyon Court, may be brought here by advocacy, or, after the thing is done, by reduction; and this I hold to be a well-founded doctrine. We ought therefore to repel the defence so far as founded on defect of jurisdiction, and remit to the Ordinary to hear on the objections to the title and libel.

**LORD PITMILLY.**—A difficulty arises from the way in which the Lord Ordinary's interlocutor is framed, reserving all questions of title. I apprehend, however, that the question of competency which we have to decide is not an abstract point; but whether the particular summons before us is competent or not. As to the abstract principle, it is clear, that wherever there is a competition as to the right to armorial bearings, an appeal lies to this Court by advocacy, and also by reduction, which is the proper remedy when the arms are already granted; or even if the Lyon refuse arms to a party entitled, this Court has jurisdiction to give redress. The Lyon Court is, in fact, just on the same footing with other Inferior Courts. But this opinion does not affect the present action, which is not competent, as the pursuer does not claim the arms given to the defender.

**LORD JUSTICE-CLERK.**—I found it impossible to form a satisfactory opinion without looking to the summons, and I deny the power of a Lord Ordinary to ask the Court for an opinion on an abstract question of law, without reference to the action before him. It is on the competency of this particular action that we are to judge; and I entertain great doubts of its competency, as it does not sufficiently set forth that what the Lord Lyon has done is to the prejudice of the pursuer. In regard to matters of arms, the Lord Lyon has a ministerial power; and unless he invades the rights of others, this Court has no jurisdiction to review his proceedings. There never was a case where the Court entertained an action of this nature, unless it was set forth that the act complained of was to the prejudice of the party bringing it. Now there is no sufficient allegation to this effect here, and I hold that to be essential to the question of jurisdiction.

*Pursuer's Authorities.*—A. S. July 4. 1679; March 16. 1561; Oliphant, July 11. 1633, (10627); Bruce, March 23. 1707, (3167); Dirlston's Doubts, p. 185; Lord Lyon, 1673, Fount. MS.; Dundas, March 9. 1762, (not rep.); Moir, Nov. 5. 1794, (15537); Proc. Fisc. of Lyon Office, June 4. 1778, (7656.)

*Defender's Authorities.*—1587, c. 46; 1672, c. 21; 4. Bank. 6. 12; Kames' Tr. p. 226.

J. and W. FERRIER, W. S.—H. MACQUEEN, W. S.—Agents.

No. 257.

A. MURRAY, Pursuer.—*D. of F. Cranstoun*—A. Wood.  
J. MURRAY'S TRUSTEES, Defenders.—*Sol.-Gen. Hope*—  
*Rutherford.*

*Deathbed—Renunciation by Heir.*—Circumstances in which it was held, that a deed granted by an heir-at-law, during the life of his ancestor, renouncing his legal rights, and another deed executed subsequently to his death, ratifying the former one, formed no bar against a reduction by him, on the head of deathbed, of a deed depriving him of his legal rights.

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THE late John Murray was proprietor of heritable and moveable property in the Isle of Skye to the extent of £10,000, and his heir-at-law was his nephew, Angus Murray, the pursuer. On the 4th of April 1823 John Murray executed a deed of settlement, by which he conveyed his whole property to trustees for behoof of the son of his own illegitimate son, subject to the burden, inter alia, of a legacy of £400 to the pursuer. This deed was executed at the time when John Murray was on deathbed; and the trustees whom he appointed, and who accepted, were his wife, his illegitimate son, and a Mr. Souter, the clergyman of the parish. The deed was written by the latter, who, soon after it was executed, applied to the pursuer to renounce his legal rights as heir; and, accordingly, a deed to that effect was granted by him on the 22d of April. At this time the pursuer had just attained majority—had never been beyond the Island of Skye—was entirely inexperienced—and was residing with a schoolmaster, in order to be taught reading and writing. There was no evidence that the deed of settlement had been exhibited to him; and from a letter which he addressed to his uncle on the same day on which he executed the renunciation, it appeared that he was under the impression that his uncle meant to disinherit him entirely. By this renunciation (which was written by Souter,) the pursuer stated that he had, 'for good and onerous causes, and of my own free will and consent,' resigned 'all right and claim which I may have, or may suppose myself to have, to any part of the property, heritable and moveable, of my uncle John Murray, Esq. of Grishernish, excepting the sum of £400 sterling directed by him to be paid to me by a settlement made and subscribed by him on the 4th day of this present month of April; and such claim or right I renounce in favour of the person or persons to whom in said deed he has signified his wish that it shall belong: And I bind and oblige myself and foresaids to raise no action at law, or call in question or authorize any action at law to be raised, for the purpose of reducing the above-mentioned or any other settle-

'ment of his affairs, on the ground of legal informality or any other ground, and that in consideration of the kindness of my uncle to me at all times, but especially of the provision of £400 which in his said settlement he has expressed his wish to make for me, besides having acted with like liberality towards my brothers and sisters.' Eight days thereafter, and twenty-six after the execution of the deed of settlement, John Murray died of the disease under which he laboured at the time of making it. Immediately thereafter Souter, on behalf of himself and the other trustees, consulted counsel as to the validity of the renunciation by the pursuer, requesting advice as to the mode in which the trust-deed could be lawfully protected against any challenge at his instance. An elaborate opinion, extending to upwards of fifty pages, was given by two counsel, in which they stated that the renunciation was not effectual; and that the pursuer could not be deprived of his legal rights, except by an act of his own free and spontaneous will, and after he had been made acquainted with the nature and extent of his rights. On receiving this opinion, the person in favour of whose son the deed of settlement was granted sent a note to the pursuer, requesting him to attend a meeting of the trustees, without explaining for what purpose. A meeting was accordingly held on the 9th of June 1823, at which the trust-deed, together with the case and relative opinion of counsel, were laid on the table, and at which the pursuer was present, but was not assisted by any agent or other friend; and it did not appear that any information was given to him as to the extent and nature of his rights. The minutes of this meeting, after mentioning that the widow of the testator had agreed to accept of the provisions made in her favour by the deed of settlement, bore that 'Mr. Angus Murray, nephew and heir-at-law of the deceased, in like manner, and from feelings of gratitude and regard for his deceased uncle, and from a conviction of the probably ruinous effects to all parties of any attempt to disturb the settlements of the defunct, declares his acquiescence in the provisions made for him by the trust-settlement of 4th April last; but whereas some advance is necessary to enable him to prosecute his studies, and it appearing from the unsigned document of 22d April 1823 that his uncle saw the expediency of such advance, he expects that the trustees, in return for his homologating and confirming the renunciation executed by him on the same day, will advance him £100 at each term of Martinmas for three years, commencing at Martinmas first; that they shall advance the balance of his legacy, being £100, at any time thereafter on demand; and also a further sum of £100,

‘in consideration of his signing such deeds, and doing such acts  
‘as may be found necessary by the trustees for completing their  
‘title to the lands.’

A contract (which was also written by Souter) between the pursuer and the trustees was executed, dated *ex facie* on the following day; but it was alleged by the pursuer that he was required to subscribe it at the meeting; and that although the trust-deed was in part read to him, yet the case and relative opinion of counsel were not, so that he had no opportunity either of deliberating by himself, or consulting with his friends; and that he was induced to sign the deed at the earnest desire of those who were interested in its support, and on the representation, that if he did not do so, it would be attended with ruinous consequences to all concerned. The contract which was so executed proceeded on the narrative of the previous renunciation, and that the pursuer had agreed to confirm it, ‘in consideration of the provisions conceived by my said uncle in favour of me and of my brothers and sisters, and out of respect to his memory, and his wishes in regard to his succession, and in return for the said trustees having agreed to pay to me my said legacy of £400 in manner following’—viz. in the mode mentioned in the minutes; and he therefore bound and obliged himself not to take any measures to challenge or set aside the deed of settlement. A few days thereafter, Souter stated in a letter to the agents of the trustees in Edinburgh, that the pursuer ‘was present at the meeting—had access to all the documents—was fully aware of the footing on which he stood, and was no further biassed or influenced by me, than by my declaring my conviction, that were any litigation to take place among the parties to his uncle’s settlement, the issue would be uncertain, and the immediate consequences assuredly detrimental to all concerned.’

Of these two deeds of renunciation, and also of the deed of settlement, the pursuer, in January 1824, brought an action of reduction, alleging that the two former had been obtained by fraud and circumvention, and that the latter had been executed on deathbed. In relation to the deeds of renunciation, he contended, 1. That, independent altogether of fraud, the first of them was null, because it was executed during the life of his uncle; and that the presumption of law was, that it was granted, not of his own free will, but from the dread of being deprived of his rights as heir-at-law; and, 2. That the subsequent deed having been executed in order to support the former one, and under circumstances establishing that advantage had been taken of his ignorance, of his youth and inexperience, by parties interested in

the deed of settlement, to induce him to renounce his legal rights to the extent of £10,000 in consideration of £400, and that it had been impressed on his mind, that unless he executed such a deed, it would be attended with ruinous consequences, he could not be bound by it. To this it was answered, 1. That as the first deed of renunciation had been executed when the pursuer was major, and after he was aware that the deed of settlement was in existence, and that he was thereby deprived of his legal rights, except to the extent of £400, he was effectually bound by it; and that the rule of law to which he referred did not apply to such a case, but only where no deed of settlement had been made. 2. That it was not true that he was so ignorant and inexperienced, as he alleged; that, having attained majority, he must be held to have been fully capable of entering into binding contracts; and that, in point of fact, he had been made aware, at the meeting, of the extent of his legal rights, and of the nature of the deed which he had executed. The Lord Ordinary reported the case, and at the same time issued a note, in which, after stating the facts, and referring to the cases of *Lochiel's Trustees*, 8th July 1795, and *M'Neill v. M'Neill*, January 1816, he observed, 'These cases seem to lead to the conclusion, that, without being obliged to establish facility, a very unequal transaction entered into, by which a great advantage has been obtained by one of the parties from the ignorance or want of experience of the other, who ought to have been invited to seek the aid of a friend or man of business to advise with, may be set aside; and the question arises, whether the present case partakes of that character?'

'The Lord Ordinary considers it impossible to proceed in the reduction of the settlement, while the renunciation and the contract stand in the way, so that these must first be reduced before the pursuer can proceed with his challenge of the other. This last will be the subject of a trial before the Jury Court; but the Lord Ordinary entertains doubts how far the parties should be put to the expense of a proof to set aside the other writings: For, 1st, The renunciation on 22d April 1823, being antecedent to the death of the maker of the settlement, is not sufficient to exclude the pursuer's right of challenge; for if such were sustained, it would utterly defeat the law of deathbed, and no private renunciation or contract can authorize persons to act against a public law,' *Ersk. b. iii. tit. 8. § 99*; and, 2d, As to the contract 20th June 1823, it appears, 1st, That there could be but one witness as to what passed, viz. Mr. Souther, the writer of all the deeds; and however respectable he may be, his evidence would not be sufficient when not supported by

‘ other circumstances, and as being contradicted by the probabilities of the case ;—2dly, Even though the portion of the opinion as to the heir’s right to reduce was read over at the meeting, this, not being accompanied with any verbal explanation to an inexperienced young man unacquainted with his rights, would not convey any precise information ; and at all events there was not that opportunity for consultation and deliberation afforded, which so important a measure demanded, where he was renouncing a valuable succession. The matter, as it appears to the Lord Ordinary, should not only have been carefully explained to him, but he should have been desired to consult with some other friends than those who were plainly interested to support the settlement, and the opinion of counsel should have been put into his hands, for the purpose of laying it before his friends. If, after such consultation, or means of consultation at least, he executed the contract, he would have been bound by it ; but, in the circumstances under which the contract was subscribed by the pursuer, it does not appear to be the deliberate act of a person *sciens et prudens* renouncing a valuable right, in the full knowledge of its existence.’

The Court, on advising informations, found, ‘ That the pursuer is not barred by the deed of renunciation, and the contract in question, from insisting in the conclusions of the libel for reduction of the trust-settlement, and remit to the Lord Ordinary to proceed accordingly ; and found the defenders, the trustees, jointly and severally, personally liable to the pursuer in the expenses of process incurred by him at and prior to the date hereof.’

**LORD HERMAND.**—This is as ugly a case as I ever saw, and it appears to me as clear as possible. Indeed I have formed my opinion against the defenders from their own statements. The whole case turns on the validity of the renunciation of 22d April. It is no doubt true, that it was executed a few days after majority ; but it was done so at a time when the pursuer was under the belief that his uncle meant to deprive him entirely of his right of succession. Then, after his death, the trustees obtained the advice of counsel, which, however, they did not follow in the spirit pointed out to them. At this time the pursuer was a young inexperienced man, learning to write in the Island of Skye. He was called on, *remotio arbitris*, to execute a deed, renouncing £10,000 for £400 ;—no time was given him to deliberate, and he had no opportunity of consulting with his friends. The very nature of the deed itself shows that he must either have been an idiot, or must have been imposed on ; and as I am of opinion that it was obtained under the

influence of ignorance and deception, it is impossible that I can sustain it.

**LORD BALGRAY.**—I am also of opinion that the whole proceedings are tainted with fraud. The original renunciation, which was granted while the old man was on deathbed, may be traced through the whole subsequent proceedings. Besides, the circumstances show that a gross advantage was taken of the pursuer. The defenders, after consulting counsel, and thereby obtaining full information, sent a short note to this young and inexperienced man, requiring him to attend a meeting, without explaining the object of it; and it is said that they read to him a long memorial and opinion, extending to 50 pages, and called upon him forthwith to make up his mind on the subject. Supposing that he was capable to comprehend so long an opinion at the moment, still no information was given to him as to the extent of his rights; and he was thus required to execute a deed renouncing important and valuable interests, when in fact he was blindfolded. No doubt, he was at this time two months above majority; but the Court, in cases of this nature, do not draw the principles of law so strictly as to exclude a party from redress. I am therefore clearly of opinion that this renunciation cannot affect the pursuer.

**LORD CRAIGIE.**—It appears to me that the case is not sufficiently ripe for judgment, and that the facts ought to be investigated.

**LORD GILLIES.**—I think that there is sufficient evidence before us to show that the deeds were improperly obtained. The first one, which was executed on the 22d April, pervades, and is indeed the foundation of, the subsequent one. But that deed was granted from motives which the law reprobates; and being made from the fear of being disinherited, it cannot be binding on the pursuer. After the death of the truster, the defenders got the opinion of counsel, and were made sufficiently aware of the inefficacy of that deed; but although they were properly advised that any deed in confirmation of it must be the spontaneous act of the pursuer, after being made fully aware of his legal rights, yet the subsequent deed which he executed was not so obtained, because, independent of every other circumstance, it is proved that it was represented to him, that unless he granted it, ruinous consequences to him would ensue—a statement which was not consistent with the fact. Perhaps the defenders acted from a desire to support what they considered to be the will of the testator; but there was an improper bias created in the mind of the pursuer, and under such circumstances as cannot make the deed binding upon him.

**LORD PRESIDENT.**—I concur with the majority of the Court. It is quite settled that the deed which was first executed by the pursuer was not good; and although I observe that Erskine speaks doubtfully on this point, yet it is perfectly clear. Taking it, therefore,

for granted, as stated by the defenders, that both the opinion of counsel and the trust-deed were read over to the pursuer, still no time was given to him to deliberate on a matter of so much importance; and he was called on to sign a renunciation of his legal rights, without having the opportunity of consulting a single friend. It is impossible, therefore, to support such a deed.

*Pursuer's Authorities.*—4. Ersk. 1. 27; 1. Brid. Index, 58; Reid, Nov. 12. 1728, (3327); Inglis, Dec. 4. 1733, (3327); Irving, Nov. 4. 1744, (3332, Elch. No. 18. Deathbed.)

*Defenders' Authorities.*—2. Bank. 304; Brown, June 17. 1736, (5624); Lothian, June 15. 1658, (5649); Stuart, June 25. 1663, (5674); Dallas, Jan. 12. 1704, (5677); Pringle, Feb. 28. 1765, (3287.)

A. GRAY, W. S.—J. and C. NAIRNE, W. S.—Agents.

No. 258. J. HALDAN, Advocate.—*D. of F. Cranstoun—Forsyth.*  
Rev. J. STRUTHERS, Respondent.—*Rutherford.*

6. Geo. IV. c. 120—*Meditatio Fugæ Warrant.*—An application having been refused by a Sheriff for a warrant to apprehend a party as in meditatione fugæ, and a bill of advocacy having been presented—Held,—1.—That the bill must be passed;—and,—2.—That the remedy of the complainer was to apply to the Sheriff to regulate interim possession, in virtue of the 42d section of the above statute.

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HALDAN presented a petition to the Sheriff of Edinburgh, stating that he was a creditor of Struthers—that he held decrees against him—that certain actions were in dependence against him—and that Struthers intended to leave the country, and go to Demarara; and he therefore prayed for a warrant to detain him as in meditatione fugæ. Struthers was accordingly apprehended, and admitted that a decree had been pronounced, and that actions were in dependence against him at the instance of Haldan; that he intended to go to Demarara in the month of February, but that this was in virtue of an appointment as minister of the Scots Presbyterian church there, to which office he had been lately appointed, and not with the intention of evading payment of his debts. Evidence to this effect having been produced, the Sheriff granted warrant for his liberation. Haldan then presented a bill of advocacy; and a difficulty having occurred in consequence of the necessity of passing it, and the record being completed in virtue of the late Judicature act, whereby a great delay would be occasioned, Lord Medwyn reported it to the Court, who passed the bill, reserving to Haldan to apply to the Sheriff to take such measures as should be consistent with justice, to regulate the rights of parties in the mean while, in terms of the 42d section of the statute 6. Geo. IV. c. 120.



Their Lordships had considerable difficulty as to the remedy to be applied to this case; but they were ultimately of opinion that the above section pointed out the course which the complainer ought to follow.

J. R. STODART, W. S.—P. PEARSON,—Agents.

J. MANUEL and COMPANY, Pursuers.—*Robertson*.

No. 259.

D. BAIN, Defender.—*Moncreiff*—*Maitland*.

*Bankrupt—Expenses*.—Held that a bankrupt under sequestration, who pursues an action, must either sist his trustee, or find caution for expenses.

BAIN, as a creditor of Manuel and Company for a sum constituted by a decret-arbital, applied for a sequestration of their estates under the bankrupt act, which was resisted by them on the ground that the debt was not due, and that the decret-arbital was null. Sequestration, however, was awarded, and a trustee was appointed and confirmed. In the mean while Manuel and Company raised an action of reduction of the decret-arbital, and presented a petition for recall of the sequestration. In defence against the reduction Bain contended,—1. That Manuel and Company had no title, without the concurrence of the trustee, to insist in the action;—and, 2. That, at all events, as they were bankrupts, and as their estates were under sequestration, they were bound to find caution for the expenses before they could be heard. The Lord Ordinary found, ‘That the estate of the pursuers having been sequestrated on the application of the defender Bain, as a creditor, in virtue of a decree-arbital, the pursuers have applied to the Court for a recall of said sequestration, on the ground that the debt, as ascertained by the decret-arbital, is not truly due;—that this process of reduction has been instituted in support of the said petition for recall;—and therefore that, in the circumstances of the case, it is not competent for the pursuers to institute this process without the concurrence of the trustee, nor can they be called upon to find caution for the expenses before proceeding with it;’ and repelled the defences accordingly. In a note his Lordship observed—‘The rule as to a bankrupt finding caution for expenses is this: Whenever a claim ought to be prosecuted by the trustee for the creditors, if he abandons it, and the bankrupt takes it up, it is but reasonable that the defender should have security from the pursuer for expenses, if he should be found entitled to them. In such a case he would have recovered them from the trustee; and there is a strong presumption against a claim which the

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‘ party entitled to insist in, and who would profit by the successful issue of it, declines to take it up. If a trustee assigns over such a claim to the bankrupt to prosecute in his own name, the rule would equally apply. If it were otherwise, every doubtful or untenable plea would be instituted in name of the bankrupt, and produce most vexatious results. The present case, however, is obviously a very different one.’ Bain having reclaimed, the Court ‘ altered the interlocutor of the Lord Ordinary reclaimed against ; sustained the dilatory defences, but without prejudice to proceeding, upon caution being found, and remitted to the Lord Ordinary to proceed accordingly ; and further found the defender entitled to the expense of the present discussion.’

**LORD HERMAND.**—There is no distinction between this case and any other which is pursued by a bankrupt under sequestration ; and the general rule, that he must find caution for expenses, must be enforced. If a different rule were adopted, a door might be opened to the most improper jobs, and a party called on to litigate with a bankrupt, when in truth the trustee is the proper party ; or it may be, that the trustee and the other creditors are satisfied that the action is untenable ; and it is therefore reasonable that the bankrupt who thinks fit to prosecute it, ought to find caution for expenses.

**LORD GILLIES.**—I am of the same opinion. There is nothing peculiar here, except that Bain is the petitioning creditor ; and, according to the doctrine of the interlocutor, that creditor is to be placed in a worse situation than the others. But there seems to be no ground for such a distinction.

**LORD BALGRAY.**—It appears from the minutes in the sequestration, that there are other creditors who may be entitled to carry it on, even although Bain’s debt were set aside ; and therefore the circumstance of a recall of the sequestration having been applied for cannot affect the question.

**LORD CRAIGIE.**—If there had been no other creditor except Bain, I would have had some doubt on this question ; but as there are others, the bankrupts ought to find caution.

**LORD PRESIDENT.**—I am also of opinion that caution should be found ; and indeed, if we were to draw any distinction between this and other cases, it might be productive of the most mischievous consequences ; because a bankrupt, who was unwilling that his estate should be sequestrated, would have it in his power to threaten the petitioning creditor with an action in this Court, and so involve him in expenses, without the means of redress. If, however, the

bankrupts list their trustee as a party, it will not be necessary to find caution for expenses.

*Defender's Authority.*—2. Bell, 444. 460.

J. GRAY, W. S.—P. DANIEL, W. S.—Agents.

J. HUME, Suspender.—*Pyper.*

No. 260.

WALKERS, PARKERS, and COMPANY, Chargers.—*Murray.*

*Sale—Retention of Price.*—Circumstances in which an illiquid claim of damages from misdirection of a parcel containing goods, and not brought forward till a late period of an action for payment, repelled as a ground for retention of the price.

In an action raised, in 1824, by Walkers, Parkers, and Company of Newcastle, before the Magistrates of Glasgow, for payment of certain quantities of lead furnished to Hume in the years 1819–20, the latter, after various defences had been repelled, advanced a claim of compensation or retention, on account of damage alleged to have been sustained by him in consequence of one parcel of lead having been misdirected to Glasgow instead of Kincardine. The Magistrates having decerned against him, he presented a bill of suspension of a charge given him on the decree. The Lord Ordinary, ‘in respect that the alleged claim of damages was never mentioned in the correspondence between the parties previous to instituting the action in the Inferior Court, and, on the contrary, a distinct promise is made of paying a certain sum immediately, and the balance afterwards—that it was not even brought forward in the defences—and further, that it is illiquid and unascertained,’—refused the bill, and the Court adhered.

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Lord Medwyn.

M.K.

MACMILLAN and GRANT, W. S.—CAMPBELL and BURNSIDE, W. S.—  
Agents.

No. 261.

J. LAWSON and Others.—~~Moncreiff—Murray—More.~~Mrs. STEWART and Others.—~~Jeffrey—Rutherford.~~

Competing.

*Legacy—Conditional Institution.*—A legacy having been left by a joint trust-deed of settlement made by two parties, and it being declared that the deed should be irrevocable on the death of either of them, and that, in the event of the legatee predeceasing the survivor, the legacy should fall to her 'executors or nearest of kin,' and she having survived one of the testators, but predeceased the other—Held that the legacy belonged to the nearest of kin.

Jan. 24. 1826.

1st Division.

Lord Alloway.

H.

THE late Colonel and Mrs. Baillie, on the 25th of April 1811, executed a joint deed of settlement, by which, on the inductive cause that it was made 'for the welfare of our relations and 'friends after mentioned,' they conveyed to trustees their whole property, both heritable and moveable; and in particular Colonel Baillie disposed to his wife, 'in liferent, for her liferent use alienarily, and to the said trustees,' &c. in fee, certain heritable property in Edinburgh; and, on the other hand, Mrs. Baillie conveyed to her husband, 'in liferent, for his liferent use alienarily, 'and to the said trustees,' &c. in fee, the estate of Luthrie, of which she was proprietrix. The purposes of the deed were declared to be, 1. The payment of the debts of the granters. 2. 'That the 'survivor of us shall enjoy a total liferent of the whole funds and 'estate, real and personal, hereby conveyed, during all the days 'of his or her life, and that without any control or interruption 'on the part of our said trustees, or any other person or persons 'whatever. 3. For and to the special end and intention, that immediately upon the failure of the said liferent by the death of 'the survivor of us, or as soon thereafter as to the said trustees 'may appear fit and proper, our said trustees may sell and dispose of the whole subjects, heritable and moveable, hereby conveyed, and in particular of the lands and estate of Luthrie before described, and for the further purpose of our said trustees converting the whole of our funds and estate, real and personal, hereby conveyed, into money, with all convenient speed, 'after the decease of the survivor of us as aforesaid; and when 'the said subjects are so converted into money, we hereby appoint the said trustees (after payment of our debts, and charges 'of executing this trust as aforesaid,) to pay the nett proceeds thereof to the several persons herein after named, according to 'the proportions and in the sums herein after fixed and appointed; 'which several sums we do accordingly hereby legate and bequeath to the persons after mentioned, as follows.' There are

then introduced three legacies to different parties, and thereafter a legacy in these terms :—‘ To Mrs. Janet Hamilton, otherwise ‘ Lawson, wife of Peter Lawson, seedsman in Blair street, Edin- ‘ burgh, and niece of me, the said Euphemia Baillie, excluding ‘ the jus mariti, or right of administration of her said husband, ‘ the sum of £2000 sterling.’ After various other bequests, the deed declared, ‘ Which several legacies shall bear interest from ‘ the first term of Whitsunday or Martinmas after the decease of ‘ the survivor of us, but shall not be payable for two years ‘ after that event, so as to afford our trustees time to sell the said ‘ estate of Luthrie to advantage, and to convert all our funds ‘ into money ; and, even after the expiry of the said two years, ‘ the trustees shall be entitled to postpone the payment of the ‘ said legacies, and, if they see it proper, to make interim and ‘ partial payments to the legatees, it being our intention to pre- ‘ vent our trustees from being forced to make a disadvantageous ‘ sale of any part of our property, and that they shall be as little ‘ controlled in their management as may be by the legatees, or ‘ any other person or persons whatever.’ After making a provision for an abatement of the legacies, in case of this being necessary, there was introduced the following declaration, on which the question at issue chiefly turned :—‘ And it is also hereby specially ‘ declared, that in the event of the death of any of the said le- ‘ gatees prior to the survivor of us the said Alexander and ‘ Euphemia Baillie, his, her, or their legacy or legacies shall ‘ thereby fall and belong to their executors or next of kin ; but ‘ in the event of any of the said legatees predeceasing either of ‘ us, then his, her, or their legacy or legacies shall fall and lapse, ‘ and be at our disposal ; and failing of a joint disposal thereof ‘ by us, the same shall be at the disposal of the survivor of us, ‘ by any writing under his or her hand, as aforesaid ; and failing ‘ of any such writing being executed, then our said trustees shall ‘ have the power, and they are accordingly hereby authorized ‘ and appointed, to give or divide the said legacies to or among ‘ such person or persons, and in such way and manner, as they ‘ shall agree upon.’ A procuratory of resignation and precept of sasine were granted for infesting the survivor in liferent, and the trustees in fee, and all previous settlements were revoked ; reserving, however, a power during their lives to recall this joint deed, and declaring, ‘ at the same time, that upon the death of ‘ either of us, these presents shall become an absolute and irre- ‘ vocable deed, excepting in so far as is herein before provided.’ In relation to one of the legacies, they afterwards executed a codicil, revoking it to the extent of one half, which they bequeathed

to certain other parties 'in conjunct fee, and to their heirs, executors, and successors;' but, in other respects, the deed remained unrevoked. Colonel Baillie died in April 1814, and Mrs. Baillie in September 1823. Mrs. Lawson, to whom the legacy of £2000 had been bequeathed, survived Colonel Baillie, but predeceased Mrs. Baillie. In 1804, Mr. and Mrs. Lawson had executed a postnuptial contract, by which she conveyed to her husband 'all and sundry goods, gear, debts, and sums of money, as well heritable as moveable, that are presently belonging, resting and owing to her, and shall pertain and belong to her during the standing of the said marriage, with all action and execution competent to her thereanent.' Mr. Lawson survived his wife, but he predeceased Mrs. Baillie. He had no family by this marriage; but Lawson and others, (one of the competing parties,) were his children by a former marriage, and had been appointed by his testament his sole executors.

The trustees entered into possession in virtue of Colonel and Mrs. Baillie's deed; and a dispute having arisen between Lawson and others, and Mrs. Stewart and others, (who were the children of a sister of Mrs. Lawson, and were her nearest of kin,) relative to the legacy which had been provided to that lady, the trustees raised a multipolepinding to settle the question. By Lawson and others it was contended,—1. That by the death of Colonel Baillie the deed became irrevocable, and the trustees were immediately vested in the fee, for the purposes therein mentioned;—that as Mrs. Lawson had survived Colonel Baillie, and as the deed was thus rendered irrevocable, the right to the legacy had vested absolutely in her;—that, in virtue of the postnuptial contract, her right had been transferred to her husband, and that again he had conveyed it to them by his testament, and by his nomination of them as executors;—and, 2. That, at all events, and supposing the legacy not to have vested in Mrs. Lawson, there was a conditional institution in favour of her 'executors or next of kin;'—that these expressions were not synonymous, but were disjunctive; and that Mr. Lawson being the executor of his wife, the right to the legacy had vested in him, and had been validly transmitted to them. On the other hand, it was contended by Mrs. Stewart and others, 1. That as it had been provided by the deed, that 'in the event of the death of any of the said legatees prior to the survivor of us the said Alexander and Euphemia Baillie, his, her, or their legacy shall thereby fall and belong to their executors or next of kin;'—that as Mrs. Lawson had predeceased the survivor, the legacy had not vested in her; and that, as this was a conditional institution in favour of the executors or next of kin,

the legacy belonged to the parties who held that character. 2. That the expression 'executors or next of kin' was not intended to be disjunctive, but as synonymous; and that as Stewart and others were the next of kin of Mrs. Lawson, the legacy belonged to them; and, 3. That it was the evident intention of the testators that the legacy should not belong to Mr. Lawson, whose *jus mariti* was excluded, and that the postnuptial contract, on which his right was founded, did not confer on him the character of executor of his wife. The Lord Ordinary preferred 'Mrs. Stewart and the other next of kin of Mrs. Lawson to the legacy of £2000, in respect that it is expressly provided by the settlement, that "in the event of the death of any of the said legatees prior to the survivor of us the said Alexander and Euphemia Baillie, his, her, or their legacy or legacies shall thereby fall and belong to their executors or next of kin;"—and therefore the executors or next of kin of Mrs. Lawson were called as conditional institutes, she having survived Colonel Baillie, but having died before Mrs. Baillie, when the legacy became payable.' To this interlocutor the Court, after being equally divided, and having called in the Lord Ordinary, adhered; and thereafter, on advising a reclaiming petition, with answers, and a hearing in presence, they again, by a majority, adhered.

At the first advising, Lords Hermand and Balgray were for altering the interlocutor, and the Lords President and Gillies were for adhering; and Lord Succoth being absent, Lord Alloway was called in, and gave his vote in support of his interlocutor. At the second advising, Lord Hermand held that the legacy had vested in consequence of Mrs. Lawson having survived Colonel Baillie, and of the deed being thenceforth irrevocable;—that the words 'executors or next of kin' were employed in a disjunctive sense, and that the Court were not entitled to put a construction upon them different from that which was their usual and correct meaning;—that an executor was not necessarily the next of kin, and as little was the next of kin necessarily the executor; and therefore the right to the legacy belonged to Lawson and others, as representing the executor of the legatee.

LORD CRAIGIE was of opinion that, immediately on the death of one of the parties, an absolute right was vested in the trustees for behoof of the legatees, and that therefore Mrs. Lawson had acquired a transmissible interest in the legacy; and he concurred in the view which had been taken by Lord Hermand, as to the expression 'executor or next of kin.'

LORD BALGRAY stated that he had altered his opinion, and that, on looking at the whole deed, and at the intention of the parties, he

was satisfied that the words 'executors or next of kin' were synonymous, and that, by the death of Mrs. Lawson, the legacy fell to those who were the next of kin, and that these persons were Mrs. Stewart and others.

LORD GILLIES was of opinion that there was a conditional institution, and that the intention of the parties was, that in the event of Mrs. Lawson predeceasing the survivor, the legacy should belong to those who were her nearest of kin.

The LORD PRESIDENT concurred, and observed that the word *or* was often employed in an explanatory sense; as for example, if a legacy were left to one of their Lordships, under the designation of 'one of the Lords of Council and Session, or Senators of the College of Justice,' there could be no doubt that this was one and the same individual, and that, in common language, the term 'executors or next of kin' was frequently employed as synonymous. He also doubted whether Mr. Lawson had any right to the character of executor to his wife, seeing that he was properly an assignee under the postnuptial contract.

*Lawson's Authorities*.—8. Ersk. 9. 2; 3. Stair, 8. 21; 2. Dict. 395; Inglis, July 16. 1760, (8084); Fleming, June 6. 1798, (8111); Scott, Dec. 13. 1769, (8090); Nicolson, Dec. 16. 1806, (No. 2. App. Legacy); Blackstone, 369; 3. Stair, L. 1.

*Stewart's Authority*.—Graham, Feb. 17. 1807, (No. 3. App. Legacy.)

J. BROWN,—J. and C. NAIRNE, W. S.—Agents.

No. 262.

Mrs. CLARK, Pursuer.—*Ivory*.

Mrs. GIBSON, Defender.—*Brownlee*.

*Usury—Husband and Wife*.—Held—1.—That an annuity of £55 : 11 : 6 having been sold for £450, and the principal insured on the life of the annuitant, who was 28 years of age, was not usurious;—2.—That an assignation of that annuity for the annuitant, who was a married woman, was not objectionable, as being a personal contract, her husband's *jus mariti* being excluded;—and,—3.—That she was barred, in the circumstances, from objecting that it was not ratified.

Jan. 24. 1826.

1st DIVISION.

Lord Medwyn.

D.

THE late George Willison, by a deed of settlement, secured an annuity of £75 to his daughter, the pursuer, excluding the *jus mariti* of her husband. After his death, she married a person who became embarrassed in his affairs; and being desirous to raise money for her husband, she advertised the annuity for sale, and announced that the principal sum would be secured by insurance. Part of this annuity, to the extent of £55 : 11 : 6, was accordingly sold in 1804 by the pursuer, with consent of her husband, to the defender Mrs. Gibson for £450, with an insurance on the life of the pursuer, who was then 23 years of age. An assignation was thereupon executed by her and her husband



in absolute terms; and the annuity was thenceforth regularly paid to Mrs. Gibson. In 1824 an action of reduction of the assignation was brought on various grounds, but particularly,—

1. That being a personal contract made by a married woman, and for which she had not received any consideration, seeing that the money had been paid to her husband, it was not effectual;—  
 2. That she had never ratified it, and therefore was not bound by it;—and, 3. That it was truly a loan of £450, the repayment of which was secured by means of the insurance on her life for an annual sum of about £55, which was to be redeemable, and therefore was usurious. To this it was answered,—1. That she had come under no personal obligation, but had merely sold a part of her estate for a price which had been paid to her; and the defender could not be affected by the mode in which she disposed of that price;—2. That a ratification was not necessary, and, at all events, she had hemologated the transaction for upwards of 20 years;—and, 3. That the price which had been paid was, at the time, a fair consideration for the annuity; that the circumstance of the pursuer's life being insured could not render the transaction usurious, and that the deed proved that the sale was absolute.

The Lord Ordinary found, that 'this was a transaction which 'the pursuer was legally entitled to enter into, as affecting the 'property which belonged to her exclusive of the *jus mariti*, and 'inferring no personal obligation against herself; that the allegation that the transaction was to be for a redeemable annuity, is 'not relevantly brought forward in opposition to the formal deed 'founded on, nor any relevant offer of proof made to substantiate 'it;' and assolizied the defender. In a note his Lordship observed, that 'the annuity was certainly acquired on most favourable terms—12½ per cent. on a life of 23; and it is admitted 'that all risk of loss was removed by insurance. Neither ground, 'however, seems sufficient to set aside the transaction on the head 'of usury. These points are firmly established both by the law 'and practice of England. See Comyn on Usury, pp. 46 and '69.' To this interlocutor the Court adhered.

ANDERSON and WHITEHEAD, W. S.—D. M'GOWN,—Agents.

No. 263.

W. RAMSAY, Suspender.—*Fergusson*.  
Dr. J. AITKEN, Charger.—*Graham Bell*.

*Bill of Exchange*.—Circumstances in which a bill of suspension was passed simpliciter of a charge by an indorser on a bill.

Jan. 26. 1826.

2d Division.

Bill-Chamber.

Lord Medwyn.

M'K.

JAMES AITKEN and Company of Leith discounted with Messrs. Allan and Company a bill drawn by them on and accepted by Ramsay. This bill having been dishonoured and protested by Allan and Company, it was retired on the 9th of November, and a charge given on it to Ramsay by Dr. Aitken, (James Aitken's brother,) whose name appeared on the bill as indorser, and in whose favour a receipt had been granted by Allan and Company, and indorsed on the protest. Of this charge Ramsay presented a bill of suspension without caution, on the ground that it was proved by a letter received by him from James Aitken and Company, dated November 10, stating the bill to be then in their possession—that it had been retired by James Aitken and Company, and must therefore have been subsequently conveyed to Dr. Aitken, the brother, to avoid the plea that it was an accommodation granted to them. To this it was answered by Dr. Aitken, that non-onerousity on his part, or that he was not a bonâ fide holder, could only be proved by his writ or oath, and that he could not be affected by his brother's letter, which, he alleged, contained an incorrect statement as to the bill being in his possession on the 10th November. The Lord Ordinary passed the bill, and the Court unanimously adhered.

J. RUSSELL,—W. M. LITTLE,—Agents.

No. 264.

JAMES SCOTT.—*Fullerton—Walker*.  
T. and J. HAMILTON.—*Cuninghame—Tait*.

*Process—Stat. 6. Geo. IV. c. 120*.—Cases ordered in causes not prepared under the Judicature Act do not fall under the sanction of the penalties in that statute.

Jan. 26. 1826.

2d Division.

Lord Cringletie.

M'K.

ON the 18th November last, the Lord Ordinary, in a multiple-poin ding not prepared in terms of the new Judicature Act, ordered Scott and Hamiltons, claimants, 'with the view of giving both 'parties an opportunity of stating their cause with conciseness 'and perspicuity'—'each to prepare a Case as nearly in conformity to the directions the 6. Geo. IV. c. 120. as possible,' to be lodged within a certain period. Hamiltons' Case was marked by the collector of the fee-fund within this period, and lodged

with the clerk three days after its expiry; but Scott's Case not having been given in, the Lord Ordinary, a few days thereafter, on the application of Hamiltons, preferred them to the fund in medio, 'in respect they have lodged their Case with the clerk, in terms of the 53d section of the A. S., and the other claimants have failed to lodge their Cases.'—Against this interlocutor Scott presented a reclaiming note, praying to be reponed, without payment of any previous expenses, on the grounds, 1. That the penalties for not lodging Cases could only apply to those ordered in terms of the statute, and in causes which had been prepared under it;—and, 2. That, at any rate, the other party, having likewise failed to implement the order, was not entitled to demand the infliction of the penalties. The Court unanimously remitted to the Lord Ordinary to repon Scott, without payment of any previous expenses. \*

**LORD JUSTICE-CLERK.**—The penalty imposed by sect. 53. of the A. S. for failure to lodge 'Cases,' is applicable only to those which are ordered by the Lord Ordinary 'in the due preparation of the cause,' which must mean a preparation in terms of the statute, to the 16th section of which the A. S. refers. But no steps had been taken to prepare this cause under the statute, nor were the Cases ordered in terms of the act. The Lord Ordinary merely recommends the parties to put their arguments in the shape of Cases, as has frequently been done in the Inner-House, where Cases were not enjoined by the act; and, in instances like these, the provisions of the A. S. do not apply. Besides, whatever the Lord Ordinary may be entitled to do *proprio motu*, a party who has himself failed to obey the order, as happens here, is not entitled to demand the imposition of the penalties on his opponent.

The other Judges concurred.

**R. ROY, W. S.—J. HAMILTON, W. S.—Agents.**

**GILLESPIE'S REPRESENTATIVES, Pursuers.—Whigham.**  
**QUEENSBERRY EXECUTORS, Defenders.—Jeffrey—Cay.**

No. 265.

*Process*—48. *Geo. III. c. 151.*—A party allowed to be reponed, under the above statute, against an interlocutor in his own favour to a certain extent, and which had become final by mistake.

IN certain actions of damages at the instance of the tenants on the Queensberry estate, whose leases had been reduced, against the executors of the late Duke of Queensberry, valuators were appointed to inspect the several farms, and report what they con-

Jan. 26. 1826.

2D DIVISION.  
Lord Cringletie.  
F.

\* Their Lordships, in a subsequent case, (Denham, Feb. 9.) held the same rule to apply to condescendences ordered in causes formerly in Court.

sidered a fair rent. They accordingly gave in a report, in which they valued the farm of the late Thomas Gillespie at £90 a year; and in a condescendence lodged by his representatives they claimed, as the damage sustained by them, the difference between the old rent and this £90 for all the years which remained unexpired when the lease was reduced. On this principle the Lord Ordinary, in March 1825, pronounced an interlocutor, finding the executors liable in a sum of damages. A few days after the date of this interlocutor, some verbal communication passed between the agent of the executors, and the agent who acted for Gillespie and nearly 800 other tenants, as to a proposal for calculating the damages in those cases where no decisions had been pronounced, not according to the valuation, but according to the rent actually paid under the new leases, (which, in Gillespie's case, was £140 instead of £90,) an arrangement which was ultimately gone into in all such cases. In December last, Gillespie's representatives, with a view of getting their damages calculated on this more favourable principle, moved the Lord Ordinary for leave to apply to the Court to be reponed against his interlocutor, on payment of the previous expenses, under the 48. Geo. III. c. 151, which provides for reponing parties against 'interlocutors against them, which may have become final through 'mistake or inadvertency.' His Lordship having granted leave, the executors reclaimed by note, on the ground that the act of Parliament was not intended to afford a party the means of getting rid of an interlocutor in his own favour, obtained on his own motion, and to the full extent of his claim, as restricted in his condescendence, in consequence of future circumstances rendering it probable that he would obtain a more favourable judgment. The Court, however, on ascertaining that the agent for the pursuers had, after the communication from the agent of the executors, received general instructions to keep open all the cases depending between the tenants and the executors, and that he had not represented against the interlocutor in this action through inadvertency, unanimously refused the note, and thereafter reponed the pursuers.

The Court were of opinion, that the question, as to how far the pursuers had restricted their claims by their condescendence, was not before them, and that it remained open after the pursuers had been reponed; but they held that the interlocutor having become final by inadvertency, the Lord Ordinary had acted correctly in allowing this application to be made.

A. GOLDIE, W. S.—LAMONT and NEWTON, W. S.—Agents.

Lieutenant-Colonel MACNEIL, Pursuer.—*Moncreiff*—*Jameson*. No. 266.  
MACNEIL'S TRUSTEES, Defenders.—*Skene*.

*Entail—Antenuptial Contract*.—A party having, by an antenuptial contract, bound himself to convey his estate to the heirs of the marriage, and reserved a power to make an entail prohibiting alienations and contracting debts, but not as to altering the course of succession, and having executed an entail with a prohibition to the latter effect—Held that it was ultra vires, and that the entail was null in toto.

THE late Roderick Macneil, who was proprietor in fee-simple of the lands of Barra, entered into an antenuptial contract with Miss Cameron, by which, in contemplation of their marriage, ' the said Roderick Macneil of Barra does hereby contract, provide, and secure the lands and estate of Barra, as specified and ' contained in the obligation to infest above written, here again ' held as repeated brevitatis causâ, or as the said lands and estate ' may be more particularly described in the titles and investiture ' thereof, in favours of the persons and in manner underwritten: ' That is to say, he obliges himself, and his heirs and successors ' whatsoever, to make due and lawful resignation of the said lands ' and estate, comprehending the particular lands and others above ' recited, with their pertinents, in the hands of his immediate ' lawful superiors thereof, and thereupon, and upon his own ' proper charges, to obtain charters and infeftments of the same ' to and in favour of himself and his said spouse in conjunct fee ' and liferent, but for her liferent use only, to the extent and in ' so far as concerns her further security for the payment of her ' liferent annuity before mentioned, in the event of her surviving ' her said husband as above, and to the heirs-male of the marriage betwixt him and the said Jean Cameron; whom failing, ' to the heirs-male of the said Roderick Macneil by any subsequent marriage; whom all failing, to his own nearest heirs-male ' and assignees whomsoever, heritably and irredeemably: And ' for that effect the said Roderick Macneil obliges him and his ' forebears to make and grant dispositions, or other proper conveyances, containing procuratories of resignation, and all other ' clauses needful for obtaining such charters and infeftments, ' under the reserved power and faculty always to the said Roderick Macneil, at any time during his life, by a deed of entail, ' or other deed under his hand, to put the heirs hereby entitled ' to succeed to the said lands and estate, under such limitations ' and restrictions with respect to alienating the same, or contracting debts thereupon, as he shall think just and reasonable; and ' to vary, alter, or enlarge the substitution in any manner he

Jan. 27. 1826.

1st Division.

Lord Medwyn.

8.

‘ may think proper, providing that the same noway hurts or pre-judges the heirs-male to be procreate of this present marriage.’

In 1806 Mr. Macneil executed a deed of entail in favour of himself,—whom failing, to the pursuer, his eldest son,—and whom failing, a series of substitutes; and among other prohibitions he declared, ‘ that it shall noways be lawful to, or in the power of ‘ the said Roderick Macneil, my son, or any of the heirs of tailzie ‘ above written, to innovate, alter, or infringe this present deed ‘ of tailzie, or the order of succession hereby established, or to ‘ do or grant any other act or deed that may infer any alteration, ‘ innovation, or change of the same, directly or indirectly.’ These prohibitions were fenced with irritant and resolute clauses. Mr. Macneil died in 1822, and the estate then opened to the pursuer as his eldest son. This gentleman having no family, except a daughter, to whom, according to the order of succession in the entail, the estate could never descend, raised an action of reduction of the entail on various grounds, but particularly that, by the ‘ deed of entail, there is a prohibition to alter the ‘ course and order of succession, fenced with irritant and resolute clauses; whereas, by the clause of reservation in the contract of marriage, no power was reserved to the said Roderick Macneil to impose any limitation or restriction upon the pursuer, the heir-male of the marriage, as to altering the course or ‘ order of succession in any entail or destination to be executed ‘ by the said Roderick Macneil.’ In defence it was pleaded,—1. That as there was a reserved power to execute an entail, this necessarily implied that it was to be an effectual entail, which it could not be, if there were not a prohibition against altering the order of succession;—2. That the contract conferred on Mr. Macneil the power to make such an entail ‘ as he shall ‘ think just and reasonable,’ so that he was entitled to make it in such terms as he saw fit;—and, 3. That, supposing the entail were ultra vires to a certain extent, it ought to be supported, so far as the reserved powers had been duly exercised. To this it was answered,—1. That the reservation was specific, and could not be extended beyond its terms;—2. That although a power was conferred on Mr. Macneil to make such an entail with respect to alienating the estate, or contracting debts, by means of such limitations as he should think just and reasonable, or to vary or alter the substitution, yet this was under the provision ‘ that the same ‘ noways hurts or prejudices the heirs-male of the marriage;’—and, 3. That if the deed were ultra vires, it could not be supported to any effect whatever. The Court, on the report of the Lord Ordinary, ‘ and in respect of the contract of marriage of the

'late Roderick Macneil, of date 4th April 1788, found that the entail in question thereafter executed by him was ultra vires, and cannot be sustained to any extent whatever; and therefore, in the reduction at Lieut.-Col. Macneil's instance, sustained the reasons of reduction of the said deed of entail, and reduced the same in toto, and decerned and declared the said deed of entail to have been from the beginning, to be now and in all time coming, void and null, and of no avail, force, strength, or effect in judgment, or outwith the same; and further found and declared that the said Lieut.-Col. Macneil is entitled to succeed to the lands and estate of Barra, contained in the contract of marriage foresaid, and deed of entail, in fee-simple, and free of all limitations, fetters, and restrictions whatsoever, in so far as imposed by the said deed of entail.'

**LORD HERMAND.**—Mr. Macneil, by reserving power to make an entail, 'and to vary, alter, or enlarge the substitution in any manner he may think proper,' had full power to execute the deed in question, and therefore it must be sustained.

**LORD BALGRAY.**—In the late cases which have been quoted by the pursuer, the Court distinctly found that a father could not affect the rights of an heir under a marriage-contract, and that his powers must be limited to those thereby reserved. In this case Mr. Macneil could do nothing except by virtue of the reservation, and if he went beyond it, his act or deed was good for nothing. No doubt, if he had reserved power to make such conditions and provisions as were essential to an effectual entail, there might have been more foundation for the plea of the defender. But he does not do so. All that he reserved was a power to put the heirs 'under such limitations and restrictions with respect to alienating the same, or contracting debts thereupon, as he shall think just and reasonable, and to vary, alter, and enlarge the substitution in any manner he may think proper;' and if he had stopped here, good and well; but he goes on to qualify it with the provision, that 'the same noways hurts or prejudices the heirs-male of this present marriage.' His powers were therefore expressly limited, and as he has gone beyond them, I am of opinion that the deed must be set aside.

**LORD CRAIGIE.**—Mr. Macneil had a reserved power to prohibit sales and contracting debts, but nothing more, and therefore he was not entitled to go beyond that power. He has, however, done so; and I think that to this extent the deed is objectionable; but I doubt whether it be competent to set it aside in toto.

**LORD GILLIES.**—If he had reserved a power to make an entail generally, then he might have framed one in such a manner as to be effectual; but his power is expressly qualified and limited. As,

therefore, he has gone beyond his powers, we must reduce in toto. Indeed, if we sustain the entail to any effect, we are truly making a deed for the entailor, because quomodo constat that he would have executed an entail, had he been aware that he had no power to make an effectual one? Accordingly, I observe that Lord Kilkerran says, that 'if there be but one irrational clause in a tailzie, it is sufficient to void the whole, as non constat that the granter would have made the tailzie, if such clause had not been in it.' I am therefore for reducing in toto.

**LORD PRESIDENT.**—I rather think that this must be the consequence; and, indeed, if Mr. Macneil had been aware that he could not make an effectual entail, he in all probability would not have put himself to the expense and trouble to frame one which was good for nothing. The case of Munro fixes the general rule as to questions under reserved powers similar to this.

*Pursuer's Authorities.*—Dunlop, July 28. 1778; Gordon, Dec. 8. 1790, (18028); Watson, June 28. 1801, (No. 4. Ap. Prov. to Heirs); Munro, Dec. 13. 1810, (F. C.)

*Defenders' Authorities.*—Nisbet, July 25. 1788, (12383); Kerr, Jan. 23. 1747, (12987); Strong, July 17. 1751, (12988); Douglas, July 25. 1751, (12989.)

T. INNES, W. S.—J. ARNOTT, W. S.—Agents.

No. 267.

J. FREER, W. S., Pursuer.—*Skene—Marshall.*

P. PETERSON, Defender.—*Sol.-Gen. Hope—Greenshields.*

*Triennial Prescription.*—A party having obtained payment of money on behalf of another, not entitled to plead the triennial prescription, although otherwise liable for the debt.

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1ST DIVISION.

Lord Meadowbank.

H.

IN 1810, Mr. Freer, writer to the signet, was employed by Peterson, a writer in Glasgow, to perform certain professional business for Mitchell and Scott, and an account to a considerable amount was contracted. Towards the end of that year, Freer transmitted his account to Peterson in order to be recovered from the clients, in which Peterson was successful, and he wrote to Freer, mentioning that he had got payment. Various payments were made by Peterson, both in relation to this transaction, and to certain debts which he had been employed by Freer to collect. The last of these payments was in 1814, and in 1823 Freer brought an action against Peterson, concluding, 1. For a balance of the money which had been recovered from Mitchell and Scott; and, 2. For another balance arising on the debts which Peterson had collected. In defence Peterson stated, that the first of these claims had been paid, and that, at all events, it had incurred the triennial prescription. To this it was answered, that as Peterson



had received payment of the money on behalf of Freer, he was not entitled to plead prescription. The Lord Ordinary 'sustained the plea of prescription in so far as regards the balance alleged to be due on the accounts of business pursued for, and said to have been contracted by the defender;' but the Court altered, repelled the plea, and remitted to the Lord Ordinary to proceed accordingly.

The majority of the Court were of opinion, that although Peterson was himself liable to Freer for the debt as his employer, and that in that character he might have been entitled to plead the triennial prescription; yet, as it was proved by his own letter that he had recovered the money from Scott and Mitchell on behalf of Freer, he thenceforth held it as his factor or agent, and therefore was not entitled to plead prescription.

*Purser's Authorities.*—Butchard, June 13. 1781, (11118); Sadler, Nov. 18. 1794, (11119); Hamilton and Co. Jan. 24. 1795, (11120.)

D. and A. THOMSON, W. S.—CAMPBELL and MACK, W. S.—Agents.

D. CAMPBELL, Suspender.—*Jameson—Ivory.*  
WILSON and M'INTYRE, Chargers.—*Robertson.*

No. 268.

*Process*—6. Geo. IV. c. 120.—Answers to letters of suspension must be returned like defences, and parties failing can only be reponed on payment of the previous expenses, exclusive of those incurred in bringing the action into Court.

IN a suspension by Campbell of a charge by Wilson and M'Intyre, on a bill of exchange held by them for behoof of Miss Goold, a minor, the letters were called and taken out to see, but no answers were returned to them; and having been called in course of the rolls before Lord Mackenzie on the 17th January, his Lordship, 'in respect of no answers being lodged,' suspended the letters simpliciter, and found the suspender entitled to expenses. Against this interlocutor Wilson and M'Intyre gave in a note, praying to be reponed without payment of any previous expenses, on the ground that it was not necessary to return answers to letters of suspension till 'required,' or ordered at the calling of the cause; and they stated that their answers were prepared in due time, but delayed to be lodged in consequence of an understanding in the Outer-House that this was the true construction of the act of Parliament, and because they thought it would be necessary to have a curator ad litem appointed to Miss Goold, the minor, for whose behoof the charge was given. It appearing, however,

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2d DIVISION.  
Lord Mackenzie.  
M'K.

that the answers so prepared were in name of Wilson and M'Intyre alone, the Court remitted to reponne them, but only on payment of the previous expenses; and they found Campbell entitled to the expense of this discussion.

The Court were unanimously of opinion, that answers to suspensions must be returned in the same way as defences; and that the expense of bringing the action into Court must be deducted in awarding the previous expenses, as in the case of ordinary actions.

—J. MACKENZIE,—Agents.

No. 269. S. BROWN and COMPANY, Pursuers.—*Cockburn—Lumsden.*  
G. BALFOUR and Others, Defenders.—*Forsyth.*

*Registered Ship-Owners' Liability.*—Circumstances in which registered ship-owners were held not liable for a furnishing ordered by a party in possession of the vessel on an equitable but temporary title, the furnishing not having been in rem verum.

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Lord Mackenzie.

M'K.

BALFOUR and others, partners of the Leith and Aberdeen Steam Yacht Company, were registered owners of the steam-boat Tourist, which plied between Leith and Aberdeen under the command of Captain Bain, who was one of the registered owners. In the year 1821, after the vessel had been laid up for the winter in Leith dock, and the master and crew discharged, she was purchased by Allan of Brighton, with a view to employ her in plying between that port and Havre de Grace,—the price to be paid, and the vendition completed, in the following May. No vendition was made out; but to enable Allan to make some alterations to fit her for her new destination, the company delivered over to him the vessel, with all her implements, &c., according to a regular inventory, under condition that he should take the tradesmen employed on her bound to look to him alone for payment; in reference to which condition he obliged himself, in the event of the vendition not being ultimately completed, to restore the vessel, with all materials, free of all cost and risk. The vessel was placed under the charge of Captain Bain, and Allan removed her into the dock of Sime and Rankine, who granted a letter agreeing to restrict their claim for repairs to Allan alone, and similar letters were taken from the other tradesmen employed at Leith. The Tourist had been formerly furnished with one chain cable; but in March 1822, Allan wrote from Brighton to Brown and Company, manufacturers in London, commissioning from them another, which he directed them to send to Bruce, his agent at Leith. In obedience to this

order, Brown and Company (one of the partners of which, Captain Brown, was aware of the nature of the transaction with Allan) sent a chain cable to Bruce, who immediately transmitted it to Sime and Rankine, in whose dock the vessel still remained. It was never put on board, but Sime and Rankine took possession of it, and afterwards arrested it in security of their account for repairs. At the period for completing the vendition, Allan was unable to pay the price of the vessel, or to fulfil his other engagements. Brown and Company then used arrestments in the hands of Sime and Rankine of 'all and sundry goods, gear, merchandise, wares of all sorts, and every other thing in their hands, custody, and keeping, pertaining to Allan;' and a few months thereafter they raised an action against Balfour &c. for the price of the cable, on the ground that, as registered owners of the *Tourist*, they were liable for all furnishings made to her, and that Allan must be considered as having been in charge of the vessel for them. In defence it was pleaded, that the furnishing was not in rem versum of the vessel, and was made on the order of a person in possession of her, on an equitable though temporary title, and that the pursuers were aware of the nature of his possession. The Lord Ordinary assoilzied the defenders, and the Court adhered.

**LORD ROBERTSON.**—Allan had no power to bind the owners of the vessel. There is no appearance of any thing like an appointment of him as ship's husband, which is always made in writing, unless it is of a part-owner. If the cable had been in rem versum, the case would have been different, but there is no evidence of this; and besides, the vessel had one chain cable already, and another was an extraordinary and unnecessary furnishing.

**LORD PITMILLY.**—Registered owners are undoubtedly, in the general case, liable for ordinary furnishings made to their vessel, even in a home port. But in this case (although I do not rest on the vessel having a cable already) Brown and Company made the furnishing on the order of Allan, who held possession on an equitable and temporary right, of which one of the partners was completely aware, and they must be held to have furnished on Allan's credit alone. The English cases, particularly that of *Young v. Brandon*, apply directly; and as the cable was sent to Allan's agent at Leith, and was not in rem versum of the vessel, I think the interlocutor must be adhered to.

The other Judges concurred.

*Pursuers' Authorities.*—1. Bell, 410, 426, 430.

*Defenders' Authorities.*—1. Bell, 430-8; *Fraser v. Marsh*, 13. East, 238; *Young v. Brandon*, 8. East, 10.

**J. YOUNG, —FALCONER and JOHNSTON, —Agents.**

No. 270.

J. BOAZ, Complainer.—*Jeffrey—G. Napier.*J. THOMPSON and Others, Respondents.—*Moncreiff—Ivory.*

*Process—Sequestration—A. S. 12. Nov. 1825.—1.—Held that a petition and complaint by a trustee against commissioners was objectionable on account of the vagueness of the charge, and the want of a specific prayer.—2.—That a Lord Ordinary to whom the complaint has been remitted in terms of the late act of sederunt, may dismiss it on such grounds, without having made up any record; and,—3.—That such complaint falls within the spirit of the 26th section of the act of sederunt.*

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2D DIVISION.  
Lord Medwyn.  
F.



AT a meeting of the creditors on George Brown's sequestrated estate, a resolution was carried to remove Boaz from the office of trustee, chiefly on account of his urging on a sale of the bankrupt's heritable property, pending an offer of composition not decided on. A protest was taken, that a counter motion had been carried by a majority of legal votes; and, on the day following, Boaz wrote to Thompson and the other commissioners, requesting them to meet with him to carry on the business of the sequestration, and particularly to examine his accounts, and to give him advice as to the upset price, &c. of the heritable property, which he had determined to advertise of new. To this communication the commissioners answered, that in consequence of the resolution of the creditors, they considered him to be no longer trustee, and they declined meeting him. Boaz then presented a petition and complaint against the resolution removing him, on the ground that it was not carried by a majority of legal votes; and at the same time, without stating any specific charge against the commissioners, but merely narrating the proceedings above mentioned, he prayed the Court 'to ordain the said John Thompson, &c., the commissioners on the said estate, to account for their management, and answer for their conduct, according to the statute, and to do therein as the circumstances of the case may seem to require.' This petition having been remitted to the junior Lord Ordinary, as falling under the rule of § 26 of the late act of sederunt, the commissioners pleaded in answer, 1. That a trustee (not being also a creditor, which Boaz was not) had no title to call commissioners to account for their conduct, especially after he had been removed by a vote of the creditors;—and, 2. That the complaint was incompetent as against them, because it was mixed up with one of a totally different nature, and did not set forth any distinct charge, nor contained a prayer for any specific order to be pronounced against them by the Court. The Lord Ordinary, 'having heard parties' procurators, dismissed the petition and complaint in so far as the commissioners are concerned; sustained the competency quoad

'ultra,' and appointed a condescendence by Boaz of what he offered to prove in support of the rest of his case. Against this interlocutor, in so far as the complaint was dismissed, Boaz reclaimed, and contended that the Lord Ordinary had no power to pronounce a judgment on the merits before the record was made up; and that from this not having been done, and from the terms of the interlocutor, his Lordship must necessarily be held to have given judgment on the question of competency merely; and as to this he maintained that the trustee had a title to complain of the conduct of the commissioners, and that the prayer quoad them was in the terms of the bankrupt act. The Court unanimously adhered.

**LORD GLENLEK.**—It does not appear to me that there is any particular form in which the Lord Ordinary must prepare cases like this. One part of the libel required a condescendence; but the other is such, that the Lord Ordinary could properly dismiss it *de plano*. I have no idea that the interlocutor proceeds on the notion that there are no circumstances under which it is incompetent for the trustee to present a complaint against the commissioners. I do not say that such a case may not exist; but we are not called on to decide that here, for, at all events, the complaint must set forth the matter complained of. Now, though there is a sort of narrative here, we are left in the dark as to what is actually complained of. The prayer also ought to be distinct as to what is asked to be done. It is unnecessary and absurd to crave that the commissioners be ordained to answer for their conduct, and account for their management. The statute binds them to do what we are asked to order them to perform. We are not asked to bid them do any thing, or to find fault with what they have done. The prayer ought to have been specific; and it affords sufficient grounds for dismissing the complaint, that the charge is vague, and the prayer not specific. And even as the charge has been explained at the bar, viz. the not concurring with the trustee in the matter in which he required the commissioners to act, there is nothing required in his letter but what ought to have stood over till the question of removal was settled. The Lord Ordinary's interlocutor is perfectly right.

**LORD ROBERTSON** concurred.

**LORD PITMILLY** entertained the same opinion, but observed that he did not object to the prayer, as it was in terms of the statute.

**LORD ALLOWAY.**—The Lord Ordinary has taken the right course as to both branches of the complaint. It is possible that a trustee may be entitled, even when removed, or at least till the removal is confirmed by the Court, to state specific charges against the commissioners; but he must do so in a relevant shape. The complaint is the libel; and although it be true that the prayer here is in the words of

the statute, that is not enough. The complainer must specify the particular acts of which he complains; and besides, if the commissioners had done what the trustee required of them, they would have been liable to a very serious complaint at the instance of the creditors.

LORD JUSTICE-CLERK.—I am clearly of opinion that there is no incompetency in the Lord Ordinary's dismissing the case, on a general view of the charges, without making up the record; for section 26th of A. S. directs the preparation of such causes to be according to the nature of the complaint, and not according to the statute. The Lord Ordinary was therefore entitled to consider the charges, and the only one is founded on the refusal to meet the trustee to concur in a sale of the heritable property, which was the very ground of removing him. If they had done so, they would have acted wrong. Without deciding, therefore, the abstract point of a trustee's right to complain of commissioners, this complaint must be dismissed.

G. and W. NAPIER, W. S.—CAMPBELL and MACDOWALL,—Agents.

No. 271.

J. REID, Pursuer.—*Robertson—Dickson.*

R. HOPE and Others, Defenders.—*Skene—Christison.*

*Reference to Oath.*—Circumstances in which it was held incompetent to refer to the oath of a party, after a judgment of the House of Lords, in a case involving a question of intention of a testator, but sustained in respect of the consent of parties.

Jan. 28. 1826.

1st Division.  
Lord Eldon.

H.

REID brought an action against Hope and others, executors of the late Robert Hope, concluding for payment of a legacy of £600. In defence they stated, that Reid was indebted to the testator in the sum of £557, and that therefore the legacy, except to the extent of the balance, was not due. To this it was answered, *inter alia*, that there was no evidence of this debt, and that, at all events, it was the intention of Mr. Hope to bequeath the £600, and to give up any claim which he might have. After a long litigation, this Court assoilzied the defenders; but the House of Lords reversed the judgment, and remitted to proceed accordingly. A reference was then made to the oath of Reid; and he having emitted a special deposition, the Lord Ordinary found it in part affirmative, and in part negative. Both parties having reclaimed, the Court held it to be negative; but being of opinion, that as the judgment of the House of Lords did not proceed upon any special grounds, and as one of the reasons of appeal was, that the testator intended to discharge the debt, and over and above to bequeath the legacy, the reference to oath in such circumstances was not competent. They therefore qualified their interlocutor with a finding, that the reference had been made by consent of parties.

J. YOUNG,—W. Renny, W. S.—Agents.

J. REID, Pursuer.—*Sandford.*

No. 272.

C. KELSO, Defender.—*Shaw.*

*Cessio*.—A party who had destroyed the books of a joint adventure, of which he was a partner, found not entitled to the benefit of a cessio, and subjected in expenses.

REID having brought a process of cessio, it was opposed by Kelso, the widow of John Yule, on the ground that her husband had entered into a joint adventure for the sale of potatoes with the pursuer and another person, of which one of the stipulations was, that the pursuer and the other partner were to sell them, and to keep books in relation to such sales;—that the pursuer had accordingly kept books, but that he had destroyed them, and that, in consequence, she had been unable to ascertain the share due to her husband, and had incurred a large expense in attempting to establish the amount against the pursuer in a process of count and reckoning. The fact of the books having been destroyed having been proved by the judicial declarations of the pursuer, and he having besides failed to account satisfactorily for part of his funds, the Court refused the benefit of the cessio in hoc statu, and found him liable in expenses.

Jan. 23. 1826.

1st Division.

D.

*Defender's Authority*.—Spence, Feb. 3. 1824, (ante, Vol. II. No. 632.)

D. FISHER,—C. FISHER,—Agents.

J. RUSSEL.—*Jeffrey—Napier.*

No. 273.

GREIG and PEDDIE, W. S.—*Cunninghame.*

*Law Agent—Expenses*.—Held that an agent is entitled to decree for expenses in his own name, although it be alleged that his clients are solvent, and that thereby the party against whom they are awarded will be deprived of a plea of compensation.

RUSSEL, as trustee on the sequestrated estate of Crawford, exposed the heritable property to sale by public roup, and Kirkland and Ferguson were preferred as purchasers. The property being burdened with securities to a greater extent than the price, the purchasers refused to pay it until relieved of them. A charge having been given to them by Russel, they brought a suspension; and, after a considerable litigation, the Lord Ordinary suspended the letters until recorded discharges of the securities were produced, and found the purchasers entitled to expenses. Greig and Peddie, writers to the signet, were their agents; and a motion having been made to allow decree for the expenses to be issued in their names as agents, this was opposed by Russel, on the ground that he was entitled to compensate these expenses with

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1st Division.

Lord Meadowbank.

S.

the price pro tanto payable to him; that the purchasers were perfectly solvent, and capable of paying their agents, and therefore that the sole object of the motion was to defeat the claim of compensation. The Lord Ordinary, 'in respect no sufficient ground has been assigned for granting said motion,' refused it. Greig and Peddie then reclaimed by a note; and the Court, considering that it was incumbent on Russel to show cause why decree should not go out in name of the agents, called upon his counsel to do so; and, after hearing parties, altered the interlocutor, and decreed for expenses in name of the agents.

The Court were unanimously of opinion, that as the expenses were truly due to the agents, and there was no allegation that they had been paid, they were entitled, on principles of equity and expediency, to decree for expenses in their own name, and that it was not relevant to allege that their clients were solvent.

GREGG and PEDDIE, W. S.—G. NAPIER,—Agents.

No. 274.

F. GIBSON, Suspender.—*Wilson*.

J. SCOTT, Charger.—*Forsyth*.

*Process*—6. Geo. IV. c. 120—*Removing*.—1.—A bill of advocacy of an order of ejection in a process of removal, refused as incompetent under the Judicature Act;—and,—2.—A bill of suspension ob contingentiam likewise refused.

Jan. 28. 1826.  
2d DIVISION.  
Bill-Chamber.  
Lord Medwyn.  
M'K.

ON the application of Scott, proprietor of the Halbeath colliery, the Sheriff of Fife granted an order of ejection in forty-eight hours against Gibson, tenant of the sutlery belonging to the establishment, but sisted execution for fourteen days, to enable him to advocate ob contingentiam of a previous advocacy of a former decree of removing depending in this Court. Gibson accordingly, on the 16th current, presented a bill of advocacy, which was de plano passed by the Lord Ordinary. Scott reclaimed, on the ground that, by the statute 6. Geo. IV. c. 120, sect. 44, it was declared incompetent to advocate processes of removing. The Court (January 27.) remitted to refuse the bill, but delayed signing the interlocutor till this day, to give Gibson time to present a bill of suspension. He accordingly gave in a bill of suspension, not stating the merits of the case, but merely praying to have it passed ob contingentiam of the previous process. The Lord Ordinary reported the bill, and stated that he conceived a suspension ob contingentiam was incompetent. The Court instructed him to refuse the bill, reserving to the suspender to present a new one on the merits.

A. STEVENSON, W. S.—D. WILSON, W. S.—Agents.



FLESHERS OF GLASGOW, Advocators.—*Forsyth—Cockburn.*  
 Mrs. C. SCOTLAND, Respondent.—*Greenshields—Graham Bell.*

No. 275.

*Incorporation.*—An incorporation having, by its bye-laws, fixed certain rates of annuity payable to decayed members and widows, such persons entitled to enforce their claim in a court of law, and not bound to accept an allowance at the pleasure of the incorporation.

THE incorporation of fleshers of Glasgow had at various periods, by general resolutions, fixed the amount of annuities to be paid to decayed members, and to widows of freemen; and at a meeting of the trade in 1807 'it was enacted,' (as the minutes stated,) 'that the annual allowances to reduced members or widows, to commence at Martinmas next, shall in future be—to members who have carried on the flesher trade for five years or upwards, £12 sterling; 2. To members who have not carried on the trade that time, £6 sterling; 3. To pendicles, £3 sterling;—and to widows of the first class, £8; to widows of the second class, £5; and widows of the pendicle or third class, £3 sterling; but with power to the master-court to increase these allowances as circumstances may require, or diminish the same, if the fund of the trade is to be encroached on, or will not afford these allowances.' No alteration of these regulations had subsequently taken place. In 1809, the husband of the respondent Mrs. Scotland (who was the daughter of a member of the incorporation) was admitted a freeman. On his death in 1819, his widow raised an action before the Magistrates of Glasgow, concluding for payment 'of £8, or such other sum, more or less, as shall be found, upon exhibition and inspection of the regulations anent the allowance to be made to the widows of deceased members of said incorporation, to be the amount to which the pursuer is entitled.' Defences were given in for the incorporation, alleging 'that the widows of members of the incorporation have no legal claim upon the funds for any sum whatever in name of annuity or otherwise,'—but stating that, at a previous meeting, they had already agreed to allow her £5 yearly; adding, however, 'but even this sum or allowance the incorporation can modify or withdraw at pleasure.' After some discussion, and a proof as to the legal claim of widows to an allowance, the Magistrates found it 'proved, that, agreeably to the bye-laws or standing regulations of the corporation, the defenders have been in the practice, for upwards of forty years, of allowing certain rates of aliment to the widows of deceased freemen;' and that from the minutes of the corporation, and other evidence

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2d DIVISION.

Lord Mackenzie.

sic.

B.

‘adduced, the pursuer’s claim for aliment appears to rest on the contract of parties, express or implied, and not to fall under the recognised rule in the case of Paterson, 10th February 1808;’ and they allowed Mrs. Scotland a proof as to whether her husband had exercised the trade of a flesher for five years before his death, so as to entitle her to the annuity of the first class of widows. On advising the proof led as to this point, the Magistrates held it sufficiently instructed that Mrs. Scotland’s husband had exercised the trade for five years prior to his death, and they accordingly found her entitled to the rate of aliment at £8 yearly. The incorporation then brought an advocation, in which the Lord Ordinary assoilzied them, on the ground, as stated in a note, that ‘the case of Paterson, and the want of contrary decisions on a point so practical, seems to the Lord Ordinary to establish at least this much, that when a corporation of this kind has fairly exercised its discretion on a claim of charitable relief by a member or member’s widow, that is all which can be legally demanded; and courts of law are not bound, nor at liberty, to review the discretion of the corporation.’ Mrs. Scotland having petitioned against the Lord Ordinary’s interlocutor, the incorporation, at the advising, gave in a minute, stating ‘that they had always been, and still were, willing to pay the petitioner the annuity of £5, and to continue the payment of the annuity in time to come, on the same footing, and in the same manner, as payment is made to the other members of the incorporation;’ and the Court, on this, ‘of consent, decerned in terms of the preceding minute; but, quoad ultra, adhered to the interlocutor complained of,’ and found no expenses due. Mrs. Scotland having, however, again reclaimed, on the ground that she was entitled to have it found that she had a legal right to her annuity, and also that expenses should be awarded in her favour, the Court unanimously altered the judgment of the Lord Ordinary, and varied their former interlocutor, ‘in respect it is not denied that the pursuer, being a widow of a member of the incorporation, was in indigent circumstances,’ found that ‘she, in virtue of the subsisting regulations, was entitled to the annual allowance provided to the widows of the class to which her late husband belonged, subject always to such variations as might become necessary from the inadequacy of the funds in regard to the provisions of the widows of the incorporation generally;’ decerned for payment of the annual allowance of £5 sterling, and found her entitled to expenses.

The majority of the Court thought that Mrs. Scotland had failed to prove that her husband had exercised the trade of flesher for five

years preceding his death ; but their Lordships were unanimously of opinion, that when an incorporation has, by its bye-laws and regulations, fixed certain rates of annuities payable to widows and decayed members, such persons are entitled to enforce their claim thereto in a court of law ; and that the incorporation having in this case coupled their offer of annuity to Mrs. Scotland with a declaration that they might withdraw it at pleasure, she was entitled to have her legal right to it determined.

*Advocate's Authority.*—Paterson, Feb. 10. 1803, (F. C.)

D. FISHER,—MACK and WOTHERSPOON, W. S.—Agents.

JOHNSTON and MANLEY, Pursuers.—*Jeffrey—More.*

No. 276.

FINDLAY, DUFF, and COMPANY, Defenders.—*Moncreiff—Ivory.*

*Lien—Factor—Consignment.*—Goods having been purchased by a joint adventure, of which the bills of lading were taken in name of one of the partners, who, without the knowledge of his copartner, delivered them to a third party, by whom they were consigned to an agent along with goods belonging to himself; and an advance having been made by the agent to the third party on the consignment,—Held, in a question between the agent and the copartner,—1.—That the goods of the joint adventure were subject to a lien for the money advanced at the time of the consignment.—2.—That they were not subject to a lien for the general balance due by the third party to the agent; but,—3.—That the agent was entitled to apply them, *prime loco*, in extinction of the special advance, so as to enlarge his security over the goods of the third party, for payment of the general balance.

JOHNSTON and MANLEY of Whitehaven entered into a joint adventure with Garden Brothers and Company of Glasgow, relative to a quantity of coffee purchased by them at Liverpool. This coffee was shipped for Glasgow; and the bills of lading were taken in favour of Garden Brothers and Company, who deposited them, in their own name solely, in a bonded warehouse, and granted an order of delivery to a third party, Garden and Sons, in whose debt they then were to a great extent. Garden and Sons were in use to consign goods to Findlay, Duff, and Company, commission-agents in Glasgow, and to obtain advances of money on the credit of such consignments. On the 7th of June 1814, with the approbation and knowledge of Garden Brothers and Company, they made a large consignment of goods, including this coffee, to Findlay, Duff, and Company, and obtained an advance of £6608. 10s., which they placed to the credit of Garden Brothers and Company. This consignment amounted to £8680, and consisted of goods the property of Garden and Sons, of Garden Brothers and Company, and of the joint adventure above mentioned, in the following proportions:—Garden and Sons' own share £717,—Garden Brothers and Company £4133,—and the joint adventure £3780. Of the latter part one-half be-

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B.

longed to Garden Brothers and Company, and the other, amounting to £1890, to Johnston and Manley. At the period of this consignment, Findlay, Duff, and Company were considerably in advance to Garden and Sons, and they subsequently made still further advances, which did not, however, appear to have been specially done on the faith of this particular consignment. Garden Brothers and Company having become bankrupt, Johnston and Manley raised an action against Findlay, Duff, and Company, before the Magistrates of Glasgow, concluding for the value of their share of the coffee belonging to the joint adventure, consigned by Garden Brothers and Company, without their knowledge or consent. The cause having been advocated, the Lord Ordinary, (Lord Pitmilley,) after some litigation, found, ' that the pursuers ' have established a real interest in the coffee, as joint adventurers ' along with Garden Brothers and Company ;—that the pursuers ' having allowed the bill of lading of the coffee to be made out in ' the name of Garden Brothers and Company, and the coffee to be ' deposited in their name in bonded warehouses, the defenders were ' entitled, on obtaining an order of delivery from Garden Brothers ' and Company, to make advances on security of the coffee thus ' delivered to, and bonâ fide received by them ; and that they ' were entitled to make such advances either to Garden Brothers ' and Company, or to Garden and Sons, for behoof of Garden ' Brothers and Company, and at their desire, in extinction pro ' tanto of a debt which was due by the company of Garden ' Brothers to the company of Garden and Sons ; but that the de- ' fenders are not entitled to retain the coffee in security of a ' general balance said to be due to them by Francis Garden and ' Sons, in competition with the claim of the pursuers.' This interlocutor having been finally adhered to by the Court, the Lord Ordinary remitted the cause to an accountant, preparatory to determining the sum due out of the proceeds of the coffee, after satisfying the special advance at the date of the consignment. In the state given in by the accountant, he deducted from the amount of the consignment £717, being the value of the goods belonging to Garden and Sons, as applicable to the extinction of a large general balance due by them to Findlay, Duff, and Company, arising from advances both prior and subsequent to the consignment in question, leaving £6028 belonging to Garden Brothers and Company, and £1890 to Manley and Johnston ; and applied, in the first place, the whole of Garden Brothers and Company's share to extinction of the advance of £6608. 10s., and Johnston and Manley's to make up the deficiency of £585. 10s., whereby a balance was left of £1304. 10s. as due to the latter.

For this sum the Lord Ordinary decerned against Findlay, Duff, and Company, who reclaimed, and contended that the £6023, the proceeds of Garden Brothers and Company's goods, which were consigned with their knowledge and consent, were subject to a lien for the general balance due by Garden and Sons, in the same way as the £717 belonging to the latter themselves; in which case the special advance on the consignment of 7th June 1814 would not be satisfied, without also applying to that purpose the whole, or nearly the whole, of Johnston and Manley's share of it. The Court adhered to the Lord Ordinary's interlocutor.

W. and A. G. ELLIS, W. S.—GIBSON-CRAIGS and WARDLAW, W. S.—  
Agents.

ANDREW HOPE and Others, Complainers.—*Sol.-Gen. Hope—* No. 277.  
*Sandford.*

MAGISTRATES of SELKIRK, Respondents.—*Moncreiff—*  
*Monteith.*

*Process—Burgh Royal.*—In a petition and complaint against a town-council for receiving a deacon and colleague alleged not to have been truly elected by the incorporation, and craving to have it so found, and that the petitioners were the only true deacon and office-bearers, held not a valid objection, that the members of the incorporation were not called as parties.

By the set of the burgh of Selkirk, the town-council is composed of 33 members, 18 of whom are merchant-councillors, and the remaining 15 are trades-councillors. The 15 trades-councillors are elected from the five incorporated trades of the burgh, from each of which two representatives are elected by themselves, and one by the town-council, making 15 in all. The election is made in the following manner:—Fourteen days before the Michaelmas election of magistrates, each of the trades sends in to the town-council a long leet of a fixed number of its members. This leet is shortened by the council striking off a certain proportion of the names; and from this shortened leet each trade elects two representatives,—namely, a deacon, and another who is termed a colleague. On the week subsequent to the election of the magistrates, and on the day when the new council is made up, the council elects from each trade one of its freemen, which makes the third representative. The hammermen trade met to choose the long leet on the 15th September last, when 19 freemen voted for Stoddart and others, and 12 for Scott and others. Eight individuals, however, who had not been admitted members of the incorporation, insisted on their right to be so admitted, and tendered their votes for Scott &c. Both parties

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presented their leets to the town-council at their meeting next day, for the purpose of shortening the leets. The council accepted, and shortened the leet, consisting of Scott &c., and rejected the other; on which the corporation again met, and shortened the leet chosen by the majority. Protests were taken by both parties. The two short leets were presented for election, and a double election, accordingly, of deacon &c. took place, 19 voting for Hope as deacon, Guthrie as colleague, and others as office-bearers; and 12, with the eight individuals already mentioned, for Inglis as deacon, Douglas as colleague, and certain of their friends as office-bearers. On the 23d September, the town-council having met for the purpose of receiving the newly-elected deacons and colleagues, they, by a majority, voted to receive into the council Inglis and Douglas as deacon and colleague of the hammermen. Hope and the other office-bearers and freemen of his party then presented a petition and complaint, praying the Court to grant warrant of service on the magistrates and all the members of the town-council, and thereafter 'to find, primo, that 'the town-council acted illegally in refusing to shorten the long 'leet of the corporation of hammermen presented to them by the 'complainers: secundo, that the proceedings of the town-council, 'in consequence thereof, were illegal, and are void and null: 'tertio, to find that the elections made by the complainers were 'the only legal and valid elections, and that the persons elected 'by them as deacon and other office-bearers were duly and 'validly elected into the said offices, and have the only good and 'undoubted right to discharge the duties of these offices respectively.'

This complaint having been remitted to the Lord Ordinary, it was objected by the magistrates, that the proper parties were not called; because, as the complainers prayed to have it found that they were truly the office-bearers of the incorporation, and alone had right to exercise the duties thereof, the incorporation, who had an interest, ought to have been cited. To this it was answered by Hope &c., that they did not complain of any thing done by the corporation, who had truly elected them, but merely of the conduct of the town-council in not shortening the leet chosen by the majority of the corporation, and in not receiving the deacon and colleague also elected by them; and that under the 16. Geo. II. c. 11. which regulated complaints such as this, it was only necessary to call the members of the town-council. The Lord Ordinary having reported the question on Cases, the Court unanimously repelled the objection, and remitted to his Lordship to proceed accordingly.

*Petitioners' Authorities.*—Wight, 1. 339. 541. and 2. 140; Bell, 492; Donaldson, July 29. 1789, (1890); High, Aug. 2. 1789, (1893); Lamb v. High, (not rep. Sessions Papers, Nos. 64. 87. 1788); Johnstone, &c. (Rutherglen), Feb. 1. 1810, (not rep.)

*Respondents' Authorities.*—Williamson, Mag. of Rutherglen, June 11. 1818, (not rep.); Inverness, 823, (not rep.)

J. YOUNG,—W. LANG, W. S.—Agents.

A. M'DONALD, Suspender.—*Murray—Ivory.*

No. 278.

MAGISTRATES OF INVERNESS, and FRASER and M'DOUGALD,—  
Chargers.—*Rutherford.*

6. Geo. IV. c. 62.—Circumstances in which it was held that incarcerating creditors are not entitled to insist on their debtor being examined on oath, to discover his funds, relative to the disposition omnium bonorum required by the above statute, as a condition of aliment under the Act of Grace.

M'DONALD, having been imprisoned by Fraser and M'Dougald in the gaol of Inverness, applied for the benefit of the Act of Grace, and, after making oath in terms of the statute, aliment was awarded to him. He was then required by the incarcerating creditors to execute a disposition omnium bonorum, in terms of the 6. Geo. IV. c. 62. § 7; and they further insisted that they were entitled to examine him on oath, to discover where his funds were situated; and the Magistrates pronounced an order accordingly. He refused to submit to this examination, on the ground that he was not bound by the statute to undergo a second examination; and that by the late act of sederunt relative to burgh courts, Part II. ch. 4., the only examination that was competent, was at the time when the first oath was emitted. The aliment having been ordered to be withdrawn until he complied, he presented a bill of ~~suspension and liberation~~ <sup>discharge and liberation</sup>, which the Lord Ordinary, on advising with the Court, refused. He then reclaimed; and the Court, being at last satisfied that the creditors had, in the special circumstances of this case, deprived themselves of their right to insist on the examination, and had waived their right to do so in their pleadings in the Inferior Court, pronounced judgment accordingly.

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D.

Several of the Judges delivered their opinions upon the general question, as to whether a party who is incarcerated for debt is bound to submit to an examination upon oath at the time of granting the disposition required by the above statute; and the majority were clearly of opinion, that, according to a sound construction of the statute, he was bound to give all the information necessary, so as to make the disposition available, and that he might be compelled to

do so upon oath. On the other hand, Lord Gillies doubted whether they could compel him to do more than was prescribed by the statute, which was to grant a disposition omnium bonorum, in virtue of which the creditors might attach all the property that belonged to him.

D. Houston,—R. Rox, W. S.—Agents.

No. 279.. DUKE of BUCCLEUCH and QUEENSBERRY, and his CURATORS, Pursuers.—*Thomson—Jeffrey—Fullerton—More.*

DUKE of QUEENSBERRY'S EXECUTORS, Defenders.—*D. of F. Cranstoun—Irving—Cockburn—Cay.*

*Entail—Grassum.*—An heir of entail having succeeded in reducing leases granted by his predecessor in consideration of a grassum, on the ground that they were thereby set with diminution of the rental, contrary to the prohibitions in the entail, held not entitled to recover from the executors of his predecessor any part of the grassums, as if they had been anticipated rents.

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2d DIVISION.

Lord Cringletie,  
F.

AFTER the judgment of affirmance by the House of Lords of the decision in the case mentioned ante, Vol. II. No. 7. the Duke of Buccleuch, in virtue of the reservation therein contained, raised this action against the executors of the late Duke of Queensberry, narrating in his summons that the late Duke 'did grant various tacks to sundry persons during the period of his possession of the said estate of Queensberry, partly for yearly rent, and partly for prices or sums of anticipated rent paid to himself,—thus receiving by anticipation, and applying to his own use, rents which should have belonged to, and been receivable by, Henry Duke of Buccleuch and Queensberry, grandfather, and Charles William Duke of Buccleuch and Queensberry, father of the present pursuer, and by the present pursuer himself, as heirs of entail of the said estate of Queensberry, respectively and successively, after the death of the said William Duke of Queensberry;' and concluding for payment of the amount of grassums 'so illegally received' by the late Duke. In support of this conclusion, it was argued that the grassums were anticipated rents, or at least formed part of the consideration given by the tenants for the possession of the lands, and as such belonged of right to the heir against whom the possession had been maintained for several years; and that the estate of the Duke of Queensberry was thereby rendered locupletior, to the loss of the pursuer. On the other hand, it was pleaded in defence,—1. That the only remedies available to an heir of entail against contraventions are the voidance of the act done, and the forfeiture of the right of the



contravener; and that as the pursuer had actually obtained the benefit of the first remedy, and had neglected the second, he was not entitled to resort to another not authorized by the entail.—2. That the grassums were not anticipated rents, and had been held not to be so in all the previous actions regarding the leases;—and, 3. That the Duke of Queensberry's estate was not locupletior by the grassums, as these were the price of the warrantice granted by the Duke, and that they had been bonâ fide consumed by him. The Lord Ordinary assoilzied the executors, and the Court unanimously adhered.

**LORD GLENLEE.**—The former libel was for damages generally, on account of the alleged tortious act of the Duke of Queensberry. The Court were unanimous that no damages could be claimed on that ground; and this new libel is founded solely on the plea that the grassums are anticipated rents, which would otherwise have fallen due at a future period. It is incomprehensible to me how such a plea can be maintained. If it clearly appears that rents have been anticipated, the heir is entitled to repetition, whether there be an entail or not; but I cannot conceive that the grassums here can be considered as forehand payment of rents. The House of Lords held the grassums to produce a diminution of the rental, and on that ground reduced the leases; but a diminution of rent is a very different thing from a forehand payment. There is nothing in this case to take the grassums out of the ordinary view, and to make them be considered as anticipations of rent.

**LORDS PITMILLY and ALLOWAY** concurred.

**LORD JUSTICE-CLERK** also concurred, and further observed—There was no countenance given in the House of Lords to the idea that the taking of grassums was an anticipation of rent. If such were held to be the case, then the true avail must have been paid for the lands, and there would have been no ground for reduction of the leases. In like manner, if this had been the principle, purgation must have been admitted, but the reverse was held; and I consider it to have been settled long ago, that the grassums were not anticipated rents.

**J. HOME and J. GIBSON jun. W. S.—LAMONT and NEWTON, W. S.**  
—Agents.

No. 280.

Dr. HAMILTON Junior, Pursuer.—*Cockburn.*Dr. A. DUNCAN Senior, Defender.—*Jeffrey—H. J. Robertson.*

*Slander—Reparation.*—Held that a Professor of an University, against whom, in his public capacity, certain observations of an injurious nature had been made to the Patrons, was not entitled to retaliate by using expressions of a libellous nature in his public lectures, and in speeches which he addressed to the Senatus Academicus, and by printing and publishing them, and persevering in this course for a length of time.

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Lord Medwyn.  
D.

DR. HAMILTON, Professor of Midwifery in the University of Edinburgh, being desirous that the class taught by him should be made one of those which students should be obliged to attend before they could obtain medical degrees, addressed a memorial upon this subject to the Magistrates, as Patrons of the University. After mentioning that the 'Medical Faculty of the College of Edinburgh, as it now exists, cannot communicate that information on practical subjects which may enable those students who may obtain the degree of Doctor of Medicine to practise even with safety to the public, much less to the benefit and honour of this city and country,' he proceeded to support this statement by observations on the different medical classes. In relation to that of the Theory of Medicine, which was taught by the defender Dr. Duncan, he observed, that 'when the text-book of the Professor of the Theory of Medicine is looked into, it will at once appear to the Honourable the Patrons, that all the subjects of his lectures are fully discussed by other Professors. Thus, according to Dr. Duncan's Heads of Lectures, his course consists of two parts; namely, what he calls Pathological Physiology and Therapeutics.' After explaining what was embraced under these two divisions, he stated, that 'while he can assure the Honourable the Patrons that every subject lectured upon by the Professor of the Theory of Medicine is explained either by the Professor of Anatomy, or by the Professor of the Practice of Physic, or by the Professor of Materia Medica, he does not object to those subjects being brought under one view by a distinct Professor; but he ventures to allege, that the students can derive from that individual Professor no additional knowledge which may enable them to cure diseases.' A copy of this memorial was sent by Dr. Hamilton to Dr. Duncan; and, in the letter which accompanied it, he stated that it was 'to be most extensively circulated.' A few days thereafter Dr. Duncan, towards the conclusion of one of his lectures, stated to the students, in reference to this memorial, that 'he who has ventured to assert in print, that from the lectures on the Institutions of Medi-

‘cine given at the University of Edinburgh, a student can derive  
 ‘no knowledge which may enable him to cure diseases, has pro-  
 ‘claimed himself to be either an impudent empiric, or an arrogant  
 ‘impostor.’ This lecture he printed and circulated, and sent a  
 copy of it to Dr. Hamilton, with the following verses subjoined to  
 the above passage :

‘Who would not laugh—if such a man there be;  
 ‘Who would not weep—if Hamilton were he.’

At the distance of several months thereafter, Dr. Duncan addressed a speech on the subject to the Senatus Academicus, which he printed and published. In that speech, after mentioning that Dr. Hamilton had written the memorial ‘chiefly with the view  
 ‘of promoting his own pecuniary interest, by obtaining a very  
 ‘unfair advantage over other respectable teachers of Midwifery  
 ‘in Edinburgh,’ he stated that it was his intention to bring the  
 subject fully before the Senatus, who, he trusted, would ‘inflict  
 ‘such punishment on a delinquent Professor as they shall think  
 ‘he deserves.’ On the subject of Dr. Hamilton’s class he remarked, that ‘Midwifery cannot be properly studied in an Uni-  
 ‘versity. Besides this, it is by no means necessary that every  
 ‘physician should qualify himself for being a sage femme,—a  
 ‘housy-wife in the dialect of the vulgar Scots. And indeed it  
 ‘is the opinion of many physicians, that to old women the ordi-  
 ‘nary business of midwives should be entirely confined.’ In a  
 lecture which he delivered to his students at a still later period,  
 he stated, ‘I leave you therefore to judge with what regard to  
 ‘truth it has lately been asserted by one of my colleagues in  
 ‘this University, and even in print, that from me, as an individual  
 ‘Professor, students can derive no additional knowledge which  
 ‘may enable them to cure diseases. I confidently trust, Gen-  
 ‘tlemen, that your report to your fellow-students, founded on  
 ‘what you have heard in this room, will afford ample evidence  
 ‘that this assertion, with regard to my lectures, is as false as it  
 ‘is calumnious.’ A charge was afterwards laid before the Senatus Academicus by Dr. Duncan, ‘accusing Dr. James Hamil-  
 ‘ton, Professor of Midwifery, of having presented to the Patrons  
 ‘of the University a false and calumnious libel against the Se-  
 ‘natus Academicus, as a corporate body ; against the Institutions  
 ‘of Medicine in the University ; and against the present Profes-  
 ‘sor of that branch, as an individual.’ This charge he enclosed  
 in a letter to Dr. Hamilton, in these terms :

‘*Quem Deus vult perdere, prius dementat.*

‘If Dr. Hamilton be not demented, he will honestly acknow-

‘ledge his transgressions, and beg to be forgiven by the Senatus Academicus.’ In a subsequent letter he stated, that ‘Dr. Duncan thinks it right also to intimate, that Dr. Hamilton will be charged with the same transgressions, both before the tribunal of the public and of posterity. For that purpose Dr. Duncan intends to deposit printed copies of this accusation in every public library in Edinburgh.’ He accordingly followed up this charge with a speech to the Senatus Academicus, in which he accused Dr. Hamilton of having made false and calumnious statements in his memorial to the Patrons; and in a letter, enclosing a printed copy of the speech, to Dr. Hamilton, he said, that ‘in obedience to what I consider an indispensable duty, I take this method of severely reprimanding you before the tribunal of the University, and, as a necessary consequence, before the tribunals of the public and of posterity, for what appears to me to be a flagrant and shameful breach of duty in a Professor.’

Dr. Hamilton then brought an action before the Commissaries, founding on the above paragraphs, and concluding for damages, fine, and palinode, on the ground that they were libellous. In defence, Dr. Duncan pleaded, 1. That as a member of the Medical Faculty, he was entitled to vindicate the character of that body from the charges which had been made by Dr. Hamilton in his memorial to the Patrons, by bringing his conduct before the Senatus Academicus. 2. That, as an individual who had been publicly accused of inefficiency in his public capacity, he was entitled to defend himself in the manner which he had adopted, so that the defence might be equally public as the accusation itself; and, 3. That his defence had not been prompted by malice, but by motives which were perfectly justifiable and legal. To this it was answered by Dr. Hamilton, 1. That the statements in the memorial were not directed against Dr. Duncan personally, but in reference to the utility of a certain course of study, and that he was entitled to make them to the Patrons of the University; and therefore that Dr. Duncan was not justifiable in retaliating in the mode which he had adopted, and particularly by introducing the subject into his lectures, publishing it to the world, and persevering for a period of nearly a twelvemonth in the same course; and, 2. That it was evident he had been actuated by malice, from the nature of the expressions themselves, and from the repeated occasions on which they were made. The Commissaries found, ‘that although provocation was, to a certain extent, given to the defender by some unguarded expressions relative to him, and the class of which he is Professor, contained in the pursuer’s memorial to the Patrons of the Uni-

‘versity, yet that the defender has greatly exceeded the moderation inculpatæ tutelæ, by publishing and circulating aspersions and charges of a most injurious and offensive nature, and highly ‘defamatory of the pursuer;’ and therefore found him liable in £50 of damages, in a fine of £5. 5s. to the Procurator-Fiscal of Court, and in expenses of process. Dr. Duncan then presented a bill of advocacy; but the Lord Ordinary refused it, and the Court adhered.

**LORD PRESIDENT.**—In the observations made by Dr. Hamilton to the Patrons, he did not mean to allude to Dr. Duncan personally, but intended to state it as his opinion that the class taught by that gentleman was of no utility. Dr. Duncan might have replied to that statement by addressing himself to the Patrons, and perhaps some of the expressions which he has made use of might have been excusable. He, however, followed a different course, and allowed the matter to rankle too long in his mind.

**LORD GILLIES.**—I think there was considerable blame on the part of Dr. Hamilton, and that Dr. Duncan was entitled to express himself strongly on the subject; but he continued to do so in a manner, and for a length of time, which was quite unjustifiable.

**LORD CRAIGIE.**—I apprehend that a party complaining of an injury must come into Court with clean hands; and it appears to me that the statements made by Dr. Hamilton were much more injurious to Dr. Duncan than all those which were made by the latter gentleman. In such a case, I think that action ought to be denied to both parties.

**LORD BALGHEY.**—I certainly think that Dr. Hamilton expressed himself improperly, but he was addressing himself on the state of the classes to the Patrons. He, no doubt, was blameable for what he said as to Dr. Duncan personally, and that gentleman might have retaliated in strong language, both before the Patrons and the Senatus. But he did not confine himself to this course, because it appears that he addressed himself to the students on the subject in language quite unjustifiable; and he printed this lecture, and transmitted it to Dr. Hamilton with some very offensive verses, which clearly established that it was to him he alluded.

*Pursuer's Authorities.*—M'Queen, July 25. 1781, (7466); Scotland, Aug. 8. 1776, (13984.)

*Defender's Authorities.*—Robertson, Aug. 11. 1780, (7465); M'Donald, June 2. 1813, (F. C.); 4. Ersk. 4. 80.

A. GOLDIE, W. S.—P. DUDGON, W. S.—Agents.

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The Court, on the report of Lord Medwyn, held that the word ‘or,’ § 40. p. 34. line 10. of the Judicature Act, was introduced by mistake.

No. 281.

G. STROUTHERS and Others, Pursuers.—*Forsyth.*J. LANG, Defender.—*D. of F. Cranstoun—Dickson—Green-shields—Moncreiff.*

*Reparation—Law-Agent.*—Law-agent held liable for loss arising from an heritable security being ineffectually completed, although done on the employment of the grantor of the bond, not of the lender of the money.

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2D DIVISION.

Lord Macken-

zie.

M'K.

LANG, a writer in Glasgow, was, in 1810, employed by Newbigging to prepare an heritable security for £1200, to be granted by Newbigging and one Bell in favour of the tutors and curators of the pursuers, who were then children, over certain subjects in Helensburgh, which were held of Sir James Colquhoun as superior, under titles prohibiting subfeus or dispositions to be held of any other superior than Sir James and his heirs, 'without prejudice nevertheless to the said Henry Bell and his forebears to grant securities upon the foresaid property.'—Lang, in implement of his instructions, prepared and executed the heritable bond, containing only a holding a me, and got infestment taken thereon and recorded; but he did not obtain this infestment to be confirmed by the superior. After the bond and instrument of sasine had remained in Lang's hands for some months, they were delivered by him to Newbigging, who transmitted them to the tutors of the pursuers, the creditors in the bond. In 1811, these deeds were again returned by the tutors to Lang, as their agent in relation to this matter; but he alleged that he was never specially instructed, either by them or by Newbigging, to obtain a confirmation. The deeds remained in his possession till 1819, when Newbigging was sequestrated. In 1821, the subjects over which the security extended were sold; but in the interval between the sequestration and the sale, the holder of a bond for £2000, of a posterior date, and containing also a public manner of holding only, obtained a confirmation, and thereby acquired a preference over the price, which amounted only to £1800. The pursuers thereupon raised an action against Lang, concluding for the amount of their heritable debt, on the ground that they had lost the benefit of their prior bond in consequence of his neglect to make the security effectual. He pleaded in defence, 1. That he had not been employed by the pursuers, but by Newbigging. 2. That he had not received instructions to obtain a confirmation, nor received money to pay the necessary dues, as to which the Court had determined, in *Skinner v. Paterson*, (ante, Vol. II. No. 338,) that an agent has no hypothec over his client's title-deeds; and, 3. That the error was not so gross as to sub-

ject an agent in liability for its consequences. The Lord Ordinary found, 'that in consequence of the insufficiency of the heritable security executed by the defender, the pursuers have lost the preference which they would otherwise have had upon the price of the lands libelled, and subjects thereon, by virtue of which preference they would have drawn full payment of the debt of £1200, with interest, whereas they will now draw nothing from the said price of the lands and subjects thereon;' and therefore found him liable in payment of the debt, the pursuers being bound to assign to him the right thereto, 'in order to his operating his relief from any other funds of the debtor, if there any be.' Against this interlocutor Lang reclaimed, and further alleged that he could prove by the curatorial inventories that no money had ever been lent on this bond; but the Court, holding it impossible to allow him thus to contradict the acknowledgment in the bond, unanimously adhered.

**LORD GLENLEE.**—The idea that Lang is only bound to Newbigging is most erroneous. If the case had been, that Lang had made up erroneous titles for Newbigging himself, and that the lands had been afterwards sold, the purchaser might have no immediate action against Lang; but here, although Newbigging was the employer, the security was for behoof of the pursuers. The liability of the agent does not depend on who gives the order, but for whose behoof it is given. As to the degree of negligence, if there ever was a blunder for which an agent should be liable, it is that in the present case.

**LORD ROBERTSON.**—When Lang was employed to prepare a security, it was surely to make it an effectual one. It is said that he got no instructions to confirm, and no money to enable him to do so. Newbigging probably did not know that a confirmation was necessary, but Lang must or ought to have known this, and it was his duty to mention it, and to apply for funds to obtain it.

**LORD PITMILLY.**—Lang must undoubtedly be liable for neglect. It may be a hard case, but not so hard as that of *Lillie v. M'Donald*, or as would be the case of the pursuers, were they to lose their debt.

**LORD ALLOWAY** concurred. The only question is, Has Lang made an effectual security? He has not, and he must be liable for the consequences.

**LORD JUSTICE-CLERK** was of the same opinion. Taking Lang's own statement he must be liable. Before he can plead the doctrine established in the case of *Skinner v. Paterson*, he must show that he made a demand for money to obtain a confirmation, and that he was refused.

*Purser's Authorities*.—Wood, Nov. 21. 1716, (23968); *Wm.*, July 19. 1741, (48988); Goldie, Jan. 4. 1757, (3527); Mason, Feb. 14. 1787, (13967); Lillie, Dec. 12. 1816, (F. C.); Currie, June 17. 1823, (*ante*, Vol. II. No. 382.)

W. WADDEL, W. S.—J. LANG, W. S.—Agents.

No. 282.

H. PAUL, Petitioner.—*Moncreiff—Miller.*

D. MATHIE, Respondent.—*Jameson—G. Napier.*

*Sequestration—Agent's Hypothec.*—Competent for a trustee to apply, by incidental petition to the Court, for warrant against a person who had been agent in the sequestration, for delivery of the titles and papers of the bankrupt estate; and the agent not entitled to retain them, if his claim of hypothec is reserved preferably on the estate.

Feb. 2. 1826.

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F.

PAUL having been appointed trustee on Smellie's sequestrated estate in room of Watson, removed by this Court, (*ante*, Vol. IV. No. 100,) nominated a new agent, and demanded from Mathie, the former agent in the sequestration, the titles and papers belonging to the estate, including a bank receipt for £800 payable to the commissioners, and admitted to be in his possession. This Mathie refused to comply with, except on receiving payment of his account for business incurred in the sequestration; and Paul thereupon presented an incidental petition to the Court, praying for warrant of delivery of the titles, &c., 'reserving to the said David Mathie the full effect of his hypothec for payment of any balance, if such shall appear to be due on his accounts when audited and adjusted, as a preferable claim against the estate.' This petition having been remitted to the Lord Ordinary, Mathie pleaded in answer, 1. That such an application, as against the agent in a sequestration, was not sanctioned by the Bankrupt Act, and ought to have been made to the Judge Ordinary of the bounds. 2. That if it were competent under the statute, it ought to have been in the form of a petition and complaint; and, 3. That having been employed by the creditors themselves, and not by the bankrupt, he was a creditor, not of the estate, but of the whole body of creditors, and was therefore entitled to maintain his right of hypothec against them, unless he got actual payment of his account. The Lord Ordinary refused the petition 'as incompetent, reserving to the petitioner to apply to the Judge Ordinary for obtaining delivery of the title-deeds,' &c. But the Court altered his Lordship's interlocutor, and granted warrant as craved, under reservation of the right of hypothec contained in the prayer of the petition.

Their Lordships were unanimous in holding, that as the trustee was, by the statute and act of adjudication pronounced by the Court,



conformably thereto, vested with a right to the possession of all the property and papers belonging to the estate, it was perfectly competent for him to apply, by incidental petition in the process, for the authority of this Court to obtain full effect to be given to the adjudication in his favour; and that a petition and complaint was not necessary, nor indeed the correct mode, for making such application against the agent. A majority of the Court also held that the agent could not demand more than the reservation of a preference on the estate for his accounts, especially as there were sufficient funds to satisfy his demands. It was further observed from the Chair, that a trustee ought to keep the title-deeds of the bankrupt's property in his own custody, and should not deliver them to an agent.

*Petitioner's Authorities.*—Newlands, Feb. 9. 1793, (6254); Bertram, Gardner, and Co. Jan. 16. 1794, (6256); Mowbray, March 1813; Johnstone, Jan. 23. 1823, (ante, Vol. II. p. 144); Henshall, Eliman, and Co. Nov. 23. 1811, (not rep.) Gardner.

J. T. MURRAY, W. S.—G. and W. NAPIER, W. S.—Agents.

Miss RALSTON, Pursuer.—*Keay—Cockburn.*

No. 283.

W. EATON, Defender.—*Maitland.*

*Curator—Interest.*—Rate of interest exigible from a curator holding money of the minor in his hands.

ON the death of the late Robert Ralston, the pursuer, his daughter, who was then a minor, judicially made choice of her stepmother, and of Eaton her uncle, to be her curators. When she attained majority, she brought an action of accounting against them, and a remit was made to an accountant to report. Among other charges which the accountant put to their debit was a sum of interest, which was calculated on the following principle:—He charged the curators at the rate of 4 per cent. when the balance in their hands was under £100, and at 4½ per cent. when above that sum, and allowed 5 per cent. on advances. The balance was then struck annually on the 1st of January, including interest for the past year, and was placed to their debit in the following year's account. To this Eaton objected, 1. Because he was not liable in an accumulation of interest until his office expired,—the more especially as the funds were constantly fluctuating in amount, and were not of great extent; and, 2. Because, although he had acted as the agent in relation to the affairs of the curatory, yet no allowance had been made to him on that account. To this it was answered; 1. That the

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principle adopted by the accountant was correct, seeing that the funds had been kept in the hands of Eaton himself; and, 2. That the office of a curator being gratuitous, he was not entitled to any recompense for his trouble.

The Lord Ordinary, of consent of the pursuer, restricted the rate of interest to 4 per cent. up to the period when the office of curatory expired, instead of 4½ per cent., as charged by the accountant; and, quoad ultra, approved of the report. Eaton then reclaimed, and stated various other objections of a special nature, some of which the Court sustained, in respect they were not opposed by the pursuer; 'but, quoad ultra, refused the desire of the note, and adhered to the interlocutor complained of, as to the interest of £632. 8s., being the sum due, after deducting the half per cent. interest.'

*Pursuer's Authority.*—1. Ersk. 7. 25.

*Defender's Authorities.*—1. Ersk. 1. 25; Campbell, March 2. 1802, (No. 4. Ap. An. Rent); Jardine, Nov. 23. 1813, (F. C.); Hamilton, Feb. 25. 1813, (F. C.); Swinton, March 7. 1824, (Ho. of Lords.)

J. KENNEDY, W. S.—J. GEMMEL,—Agents.

No. 284.

Sir T. BRISBANE'S TRUSTEES, Pursuers.—*Fullerton.*

J. CRAWFORD and his TRUSTEES, Defenders.—*Jameson.*

*Sale—Trustees.*—1.—One of two trustees under a voluntary trust-deed for payment of creditors, not entitled to object to a sale of part of the trust-property, on the ground that he had not interposed his consent, he having, at a meeting where the property was sold, offered a less price than the actual purchaser, and having insisted that the lands had been sold to him at that price;—and, 2.—A general offer for lands to which a right of pasturage in a common was attached, held to include that right.

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B.

JOHN CRAWFORD executed a trust-disposition of his lands of North Reillies, to which was attached a right of pasturage in a common muir, in favour of Alexander Crawford and James Lang, for the purpose of paying his debts, and conveying the reversion to himself. This property, with the right of pasturage, was advertised for sale by public roup; but no one having offered, a private meeting was held for the same purpose, at which the proprietor and his two trustees were present. At this meeting Lang, one of the trustees, made an offer in writing of £1630, which the proprietor refused to accept; and Lang left the room, carrying with him the written offer. Immediately afterwards, on the same day, Boyd, on behalf of the trustees of Sir Thomas Brisbane, made an offer of £1650 'for the lands of North Reillies,' which was accepted by the proprietor by a missive, bearing

the acceptance of the offer to be 'with consent of my trustees,' one of whom (Crawford) signed the missive along with him. Next day Lang, the other trustee, addressed a letter to Alexander Crawford, in which he insisted that the lands had been sold to him, and refused to concur in granting a title to the purchasers. They accordingly raised an action for implement, to which it was pleaded in defence,—1. That Crawford, the proprietor, had been circumvented and imposed on by Boyd ;—2. That the consent of both trustees was necessary to the validity of the sale ;—and, 3. That, at all events, the offer on the part of Boyd did not include the right of pasturage on the common muir.

In regard to the first of these defences, no relevant averments were condescended on ; and in regard to the others it was answered,—1. That as the trust-disposition did not divest the proprietor, he was still entitled to sell the property himself ;—2. That the trustees had, by their conduct, delegated to him the power to sell ; that one of them had expressly consented, and that the other (Lang) could not object to a sale at £1650, when he himself had offered £1630, and insisted that he had been the purchaser at that price ; and, 3. That the pasturage was a pertinent of the lands, and had been advertised along with them, that in previous offers on the same day, of less amount than that of the pursuers, the pasturage was expressly mentioned ; and it was offered to be proved that it was so mentioned in Lang's own offer ; but, that before a diligence to recover it out of his hands could be executed, he had destroyed it in a suspicious manner. The Lord Ordinary assoilzied the defenders ; but the Court altered, and decerned in terms of the libel.

**LORD JUSTICE-CLERK.**—There is nothing condescended on to support the allegation that Crawford, the proprietor, was imposed on ; and one of the trustees having consented, the only question is, whether Lang is in such a situation as to entitle him to object to the sale on the ground of his not having interposed his consent. His conduct acknowledges the proprietor's right to dispose of the property, notwithstanding the general trust-deed ; and even supposing his consent to have been necessary, he cannot withhold it, after having offered a less price for the lands, including the pasturage.

**LORD GLENLEE** concurred.

**LORD PITMILLY** stated, that his interlocutor had proceeded on the general irregularity that appeared in the whole transaction, which created doubts as to the sale altogether.

**LORD ALLOWAY.**—I am not surprised that doubts should have been entertained at first ; but now that the facts are fully explained, it

is evident that the pursuers must succeed in their action. The proprietor was not denuded at all by this trust-deed, and Lang is barred from objecting to the sale, as he must be held to have consented by his offering to purchase at a lower price—most improperly too, for, being a trustee, he could not have been a purchaser. As to whether the offer included the pasturage, it was a mere pertinent, and must be held to have been comprehended in an offer for the lands; and Lang's conduct, in destroying his own offer, is of itself a strong presumption that it included the pasturage.

WILLIAM PATRICK, W. S.—W. A. MARTIN, W. S.—Agents.

No. 285.

W. M. LITTLE.—*Jameson—Graham, Bell.*  
J. GRAHAM and Others.—*I. Henderson.*

*Reference to Oath—Prescription.*—Held that claims on bills and open accounts made in a ranking and sale brought by an apparent heir of his ancestor's estate, but which were prescribed, could not be proved by the oath of the heir who was in pupillarity at the time of his ancestor's death, and was still minor.

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THE late Edward Anderson having died in 1819, a process of ranking and sale of his estate was subsequently brought by his eldest son and apparent heir, in which Little was appointed common agent. Graham and others lodged claims, founding upon bills and open accounts due by the father, and which were contracted in 1811 and 1812, and 1815 and 1816. All these debts were prescribed by the lapse of six years in the case of the bills, and by the expiration of three years in that of the accounts, before any claims were lodged by them in process; and some of them had been prescribed at the period when Anderson died, while others were then current. At this time the eldest son was in pupillarity, and he was still in minority when the action was instituted. Little having objected to these claims as prescribed, Graham and others proposed to refer them to the oath of the son. To this it was objected, that as it was necessary to prove both the contraction of the debts, and that they were resting owing, by the oath of party,—as this was a question among creditors, and the son had been in pupillarity when they were contracted, and as he was not the proper party, it was incompetent to make reference to his oath. The Lord Ordinary sustained the reference; but the Court altered, and found it incompetent.

*Little's Authorities.*—2. Bell, 206; Stuart, Dec. 12. 1815.

W. M. LITTLE,—W. STUART, W. S.—Agents.

Mrs. SOUTER and Mrs. FALCONER, Advocators.—*Moncreiff*— No. 286.  
*Pyper.*

J. GRAY and COMPANY, Respondents.—*Brownlee.*

*Process—Diligence.*—Held, that under a remit to recall a decree in absence, and receive defences, without any thing being said as to previous expenses, the Inferior Judge has no power to make the payment of these a condition of receiving the defences.

GRAY and COMPANY, merchants in Inverness, used arrestments in the hands of Mrs. Souter, and her daughter Mrs. Falconer, two widows residing in Fortrose, as being indebted to one Dempster, and they followed up the arrestments by a process of forthcoming before the Sheriff of Ross-shire. Although they alleged that the two widows were indebted to Dempster in their own name, they did not state any facts from which this could be inferred, but rested chiefly on the allegation that they had intermitted with some moveables belonging to the deceased Charles Falconer, (Mrs. Falconer's husband,) who again was indebted to Dempster. Mrs. Souter and Mrs. Falconer employed an agent to enter defences for them; but as he was at the time meditating a plan of absconding, (which he shortly afterwards accomplished,) on account of a charge of forgery against him, he neglected their instructions, and allowed decree to go against them in absence. This decree was extracted by Gray and Company, who immediately gave Mrs. Souter &c. a charge for payment. They then employed a new agent, who proposed to Gray and Company to allow the decree to be opened up. This Gray and Company refused, and they proceeded with a pouncing of the effects belonging to the widows, who applied for and obtained from the Sheriff an interdict against the sale. Gray and Company then took out letters of caption, against which Mrs. Souter &c. presented a bill of suspension; on advising which Lord Alloway, as Ordinary on the Bills, remitted 'to the Inferior Judge to recall the decret, 'receive defences, hear parties, and proceed in the cause as shall 'to him seem meet.' When the cause came back to the Sheriff Court, Gray and Company insisted, that before defences were received, Mrs. Souter &c. should pay not only the previous expenses in the forthcoming, but those incurred in the application for the interdict of the sale, (which they contended was quite incompetent and illegal,)—and also those of the pouncing and caption. The Sheriff at first ordained the expenses to be paid; but, before this was done, he recalled the decree in absence, and allowed Gray and Company a proof that Mrs. Souter &c. were indebted to Dempster. This interlocutor was allowed to become final; but,

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instead of leading the proof allowed, Gray and Company presented a minute, insisting for payment of the expenses in the first instance; and the Sheriff-substitute accordingly appointed Mrs. Souter &c. to pay or consign these expenses, under certification. An appeal was then taken to the Sheriff-depute, who recalled his substitute's interlocutors; found that no expenses, after the offer to have the decree in absence opened up, should have been found due; and in respect Gray and Company had not availed themselves of the interlocutor, long since final, allowing them a proof, he assolizied Mrs. Souter and Mrs. Falconer, but did not find expenses due to either party. Both parties having presented bills of advocacy, the Lord Ordinary remitted to the Sheriff to recall his interlocutors, but, before receiving defences, to ordain Mrs. Souter &c. to pay the whole expenses craved by Gray and Company. The Court unanimously altered; and while they remitted to the Sheriff to recall his interlocutor of absolutor, instructed him to receive defences without payment of any previous expenses, and found Mrs. Souter &c. entitled to those incurred by her in this Court.

**LORD ALLOWAY.**—When the bill of suspension came formerly before me, I would have remitted to assolzie, had there not been an allegation that these two poor women were themselves indebted to Dempster; for, as to making them liable in a forthcoming, as having intromitted with the effects of Charles Falconer, who was Dempster's debtor, it is perfectly untenable. Could I have suspected that Gray and Company would have been allowed to claim any previous expenses, I would have remitted expressly to repon without payment of expenses; but, even under the remit actually made, the Sheriff-substitute had no power to make the payment of expenses a condition of receiving defences; and at any rate this was not a case for insisting on such a condition, more especially as to the expenses of the proceedings in the question of interdict, which in no case could he have ordained to be paid before receiving defences.

The other Judges entirely concurred; and Lord Glenlee, in reference to the legality of the application for the interdict, observed, that although a Sheriff cannot interfere to stop the execution of diligence, whether proceeding on a decree of his own or of another Court, to the effect of preventing the nexus attaching, yet there might be cases where he would be entitled to prevent a sale of the poidned effects.

**MACMILLAN and GRANT, W. S.—ROD. M'KENZIE, W. S.—Agents.**

D. ARNOT, Advocate.—*Skene—Shaw.*

No. 287.

J. THOMSON, Respondent.—*Forsyth.*

*Process—Bill-Chamber.*—Held,—1.—That the provisions of the act 48. Geo. III. c. 151, as to reponing against final decrees, apply to the Bill-Chamber;—and,—2.—That the expenses to be paid, on being so reponed, are those in the Bill-Chamber alone, and not those incurred in the Inferior Court.

AFTER the refusal, as incompetent, of the petition mentioned ante, Vol. IV. No. 182, against an interlocutor of the Lord Ordinary refusing a bill of advocacy presented by Arnot, he, with leave of the Lord Ordinary, gave in a reclaiming note, praying to be reponed under the 48. Geo. III. c. 151, § 16, on payment of the previous expenses incurred in this Court. Thomson, the respondent, objected to this, on the grounds, 1. That that statute did not apply to interlocutors in the Bill-Chamber;—and, 2. That, at all events, the expenses to be paid were those in the Inferior Court, as well as in the Bill-Chamber. The Court reponed Arnot on payment of the expenses incurred in this Court only, and subsequently, of consent, passed the bill.

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J. PEDIE, W. S.—W. RENNY, W. S.—Agents.

R. WILSON, Pursuer.—*More—Graham Bell.*

No. 288.

Miss RUTHERFORD, Defender.—*Baird—Fullerton.*

*Triennial Prescription.*—Circumstances in which the question was raised, whether an account which was current at the death of the ancestor was prescribed, although a new one was opened with the tutors of the heir.

THE late George Wilson, writer in Edinburgh, was the law-agent of the late Dr. John Rutherford, who died in 1811, leaving an only child, the defender, who was then ten years of age. Mr. Wilson and certain other gentlemen were appointed her tutors and curators; and when she arrived at majority, she brought an action of count and reckoning against them. Wilson then raised an action against her for £247, being the amount of certain accounts of business alleged to be due by Dr. Rutherford from 1793 to 1811, when he died,—and from that period to 1821, for business said to have been performed in continuation of the original account for Miss Rutherford. Against that part of the claim which had been incurred during the life of Dr. Rutherford, she pleaded, 1. That the claim was subject to the triennial prescription, and contended that the subsequent account could not be held a continuation of it, because the circumstance of her father's death brought

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D.

it to a close, and that which had been subsequently contracted had been on the employment of the tutors and curators, and in relation to matters connected with the performance of their office; and, 2. That the claim was disproved by his books. To this it was answered, that the account was current at the period of Dr. Rutherford's death, the last article being dated two days prior to it, and the business there mentioned being relative to the letting of part of his lands, which was not accomplished till subsequent to his death; and that, by being subsequently employed on behalf of the defender as the representative of her father, the currency of the account was maintained. The Lord Ordinary found, ' that ' it was established by the act of Parliament 1579, c. 83, that ' after the lapse of three years from the close of accounts, the ' same are to be held, *præsumptio legis*, to have been paid and ' extinguished, unless the same shall be proved to be resting owing by the writ or oath of the defender;—that there is no writ ' produced, or reference to oath made, by which the presumption ' of payment is elided or overruled; and that as the original ' debtor, Dr. Rutherford, did live for a short time after the last ' article of the account, there is no room for denying the application of these principles to this case, and therefore sustained the ' defences, so far as regards that part of the accounts libelled on, ' incurred previous to Dr. Rutherford's death.'—Wilson having died, his son sisted himself as pursuer; and having reclaimed, the Court, after a remit to an accountant to examine Wilson's books, adhered.

Although the Court adhered to the judgment of the Lord Ordinary, yet, in doing so, they were chiefly influenced by the report of the accountant as to the state of Wilson's books, from which it appeared that the accounts had been very irregularly and partially entered.

*Purmer's Authorities*.—8. Ersk. 7. 17; Kennedy, July 22. 1741, (Kirk. 419.)

R. WILSON,—W. ROBERTSON, W. S.—Agents.



No. 289.

Sir W. F. ELLIOTT, Pursuer.—*Moncreiff—Ro. Bell.*J. WILSON and Others, Defenders.—*Thomson—Jeffrey—Cockburn—Rutherford.*

*Statute 42. Geo. III. c. 116.—Entail—Sale—Fraud.—Circumstances in which it was held,—1.—That a sale of part of an entailed estate for redemption of the land-tax was illegal—2.—That a singular successor infest could not be affected by the fraud of his author; and,—3.—That although the next heir substitute in an entail was minor, it was competent, under the above statute, to sell part of the estate for redemption of the land-tax, provided due intimation be made to the next substitute heir who was of lawful age.*

IN 1803, the late Sir William Elliott, the heir in possession of the entailed estate of Stobbs, presented a petition to the Court of Session, founding on the 42. Geo. III. cap. 116. praying for permission to sell the farms of Hallrule, Hallrule-mill, and Town-o'-Rule, parts of the entailed estate, for redemption of the land-tax. He, however, did not state what was the amount of the land-tax, nor whether he meant to proceed under the 61st or 63d sections of the statute, the latter of which was the one which ought to have governed the proceedings, as the lands greatly exceeded what was necessary to purchase the land-tax. The petition was intimated on the walls of the Inner and Outer House, and a certificate was returned that this had been done in terms of the 61st section. Intimation was also made to Mrs. Guy, as the next substitute; but it did not appear that she was informed that Hallrule-mill was included in the application. A minute was then lodged, stating that the land-tax amounted to £56: 8: 7<sup>1</sup>/<sub>4</sub>; and a proof was allowed by the Court, in terms, not of the 63d, but of the 61st section. After the proof was reported, articles of roup were prepared and approved of by the Court; but they were blank both as to the upset price, and as to the name of the trustee required by the act of Parliament for carrying the measure into effect, and of his cautioner. The lands were accordingly exposed to sale, the blanks being filled up either by Sir William Elliott, or by some one in his behalf; and two alterations were made, by declaring that the land-tax of the lands to be sold was not to be redeemed, and that the right to the teinds was to be reserved. After a competition between Sir William Elliott and other two persons, the lands were knocked down to the former at £15,420. The price, however, was not paid into the Bank of England in terms of the statute, nor was the sale reported to and approved of by the Court. On the 18th of May 1804, Sir William disposed the lands to himself; and on the same day he executed a disposition of part of them to Wilson, who was infest on the

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20th of August. In this disposition, it was stated in the narrative, that the price which Sir William had agreed to give at the roup ' has not yet been paid or applied in terms of the foresaid ' act and warrant, nor the application thereof been approved of ' by the Court of Session.' Sir William completed his titles by taking infestment in December thereafter, and afterwards sold another lot to Wilson, and the remainder to James and George Cleghorn, the conveyances of which were in terms similar to the above. On the death of Sir William, the pursuer, his son, succeeded to the entailed estate, and brought an action of reduction on the ground, 1. That the whole transaction had been a fraud on the heirs of entail by Sir William; and that, independent of any other objection, the defenders were liable to be affected by that fraud, seeing that, at the date of their purchase, the right of Sir William to the lands was merely personal.—2. That the statute had been violated, particularly in the manner above mentioned; and, 3. That, according to the correct interpretation of the 42. Geo. III. c. 116. sect. 62. it is incompetent to sell any part of an entailed estate, unless the next substitute heir is of lawful age, and intimation made to that heir; but in this case the pursuer, who was then a minor, and not Mrs. Guy, was the next substitute heir. To this it was answered, 1. That the purchasers could not be affected by the fraud of their author, and that although Wilson had purchased at a time when Sir William's title was personal, yet he was protected by Sir William's subsequent infestment.—2. That if there were omissions in following out the statute, they were not material, and could not affect singular successors; and, 3. That the construction put on the statute as to intimation was erroneous, and contrary to its plain import.

The Lord Ordinary decreed in the reduction; and the Court, on advising petition and answers, pronounced the following interlocutor:—' Find that the defenders cannot be hurt by any alleged ' fraud on the part of the late Sir William Elliott in carrying ' through the sale under the authority of the act of Parliament, or, ' as alleged, in deceiving the Court, against the pursuer or the other ' heirs of entail, if the sale in other respects had been regularly ' conducted in terms of the act of Parliament: But find, 1. That ' the original petition to the Court for authority to sell the lands ' in question did not, in terms of the act of 42. Geo. III. c. 116, ' set forth the amount of the land-tax proposed to be redeemed, ' and that the petition was intimated under the authority of the ' Court in this imperfect state: Find that a minute was afterwards ' given in, containing a certificate of the amount of the land-tax;

' but that this minute, even if it could be held as supplying the  
' original defect in the petition, was not intimated, as the act re-  
' quires the petition to be, and therefore cannot supply the defect  
' in the petition : 2. Find, that as the petition prayed for authority  
' to sell lands in point of rent and value much more than sufficient  
' to redeem the land-tax of the whole estate, it was requisite, by  
' the 68th section of the act, that the petition, besides being in-  
' timated on the walls of the Court, should be intimated person-  
' ally to the next heir of entail in Great Britain, being of lawful  
' age : Find that no evidence of such intimation was laid before  
' the Court : Find that the letter from Mrs. Guy, which has since  
' been produced in this process, does not contain evidence that  
' sufficient intimation was made to her, as from that letter it does  
' not appear that the mill of Halkrule and mill lands had been in-  
' cluded in the intimation to her, of which her said letter is an ac-  
' knowledgment : 3. Find that the articles of roup, as prepared  
' by Sir William Elliott for the approbation of the Court, did not  
' specify any upset price, but left that blank, and the upset price  
' was thereafter fixed by some private authority, without any war-  
' rant from the Court : 4. Find that the articles of roup, even  
' as thus imperfectly prepared, were afterwards altered by Sir  
' William Elliott without any authority of the Court; by except-  
' ing the teinds, and by declaring that the lands to be sold were to  
' remain subject to their proportion of the land-tax : 5. That this  
' alteration was not only not warranted by any authority from the  
' Court, but was in itself in the face of the statute, which provides  
' that no lands shall be sold except for the redemption of the land-  
' tax thereof : 6. Find that no proof was offered to the Court of  
' the necessity or expediency of selling so large a quantity of land  
' and superiority to redeem this comparatively small amount of  
' land-tax, while from subsequent proceedings it appears that  
' these lands might have been disjoined, and any part of them sold  
' separately, which, in fact, was soon afterwards done by Sir Wil-  
' liam Elliott to these defenders : 7. Find that the price was not  
' paid into the Bank of England, as required by the act, before  
' granting dispositions to the purchasers : 8. Find it proved by the  
' terms of the dispositions to the defenders, that they were made  
' aware that the act had not been followed out : 9. Find that the  
' sales in question never were reported to and approved of by the  
' Court : Therefore, on the whole matter, adhere to the interlocutor  
' complained of, and refuse the desire of the petition ; reserving to  
' the defenders their claims for repetition of the price from the pur-  
' chaser, in so far as any part of it was applied to redeem the land-  
' tax, and to discharge the burdens which either affected, or which

' could have been made to affect the entailed estate, or the pursuer, the heir in possession; as also reserving to the defenders any claim they may have for meliorations on the lands respectively purchased by them, and to the pursuer on all these points his objections, as accords; and also reserving to the pursuer his claim for repetition of the rents, and to the defenders their objections thereto, as accords: And remit to the Lord Ordinary to hear parties on all these points, and to do therein as he shall see cause.' Against this interlocutor the pursuer reclaimed, in so far as it found that the defenders could not be affected by the fraud of their author, and implied that Mrs. Guy was the party to whom intimation should have been made, and that it would have been sufficient, if lawfully executed. But the Court, on advising the petition with answers, adhered.

The Court were unanimously of opinion, that the pleas maintained by the pursuer on the two points argued in his reclaiming petition were not well founded.

*Pursuer's Authorities.*—(1.)—4. St. 40. 21; Macdonnells, Nov. 20. 1772, (4974); Burden, June 4. 1742, (Elchies, No. 11. Fraud);—(3.)—38. Geo. III. c. 60. § 26. 29; 39. Geo. III. c. 21. 40; 42. Geo. III. c. 116. § 68.

*Defenders' Authorities.*—(1.)—44. Voet. 4; Kames' El. Art. 4; 3. St. 1. 21.

W. BELL, W. S.—J. DUNDAS, W. S.—Agents.

No. 290.

Mrs. MILLIGAN, Pursuer.—*Moncreiff*—*Graham Bell*.

EDWARD MILLIGAN and Others, Defenders.—*D. of F.*  
*Cranstoun*—*Henderson*.

*Movable Succession.*—A lady domiciled in Scotland having died possessed of funds in England, and being succeeded by her children resident in this country, who died without having expedite confirmation, held that the funds were vested in them, ipso jure, according to the law of England, so as to be transmissible to their executors, in preference to the nearest of kin of their mother.

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Lord Alloway.

H.

THE late William Milligan, merchant in Charlestown, America, but who was a native of Scotland, died in his passage to this country in 1810, leaving a deed of settlement, by which he conveyed his whole effects to trustees, inter alia, for payment of a legacy of £2000 to his sister Helen, and a share of the residue of his estate. She was possessed, at the time of her death, of £3700 of Government stock vested in her own name, being part of the proceeds of William Milligan's succession, besides other funds situated in England. This lady was a native of and domiciled in Scotland, where she died in May 1818, leaving a son and daughter, James and Anne, who were both in minority, and also a sister, the pursuer. Anne died a few months after her mother,

having executed a will bequeathing her whole effects to her brother James; and he also died in the course of the same year, having likewise made a settlement, by which he appointed the defenders his executors. Neither he nor his sister expedie any confirmation to their mother. In the mean while the stock had remained in the public funds in name of their mother; and although it was alleged that subsequent to her death they had drawn dividends, yet there was no satisfactory evidence on this point. The defenders having claimed the whole of Mrs. Irvine's funds situated in England, as validly conveyed to them by the wills of Anne and James, a dispute arose between them and the pursuer, who insisted that they belonged to her, as the nearest of kin of her sister. To settle this question, and certain other claims which it is unnecessary to notice, she brought an action of count and reckoning against them; and in support of her claim she contended, that her sister having been a domiciled Scotchwoman, the distribution and transmission of her moveable effects were regulated by the law of Scotland, as the *lex domicilii*; and that her children having died without expediting a confirmation to their mother, her moveable estate, and in particular the funds situated in England, were never vested in them, so as to be capable of being transmitted by them—that they therefore remained in bonis of their mother, and consequently descended to the pursuer as her next of kin. To this it was stated in defence, that although succession in moveables is regulated by the law of the domicile, to the effect of pointing out *who* is the party entitled to succeed, yet the question as to whether or not it had *vested* in the person of that successor, so as to be transmissible, was governed by the *lex rei sitæ*; that accordingly the children of Mrs. Irving had succeeded to her, in virtue of the law of Scotland, as her nearest of kin, and that the funds being situated in England had vested in them, *ipso jure*, agreeably to the law of that country, and therefore were effectually conveyed to the defenders by the settlements which they had executed. The Lord Ordinary having reported the case upon informations, the Court assoilzied the defenders 'quoad the money in the British funds, or which is situated or payable in England;' and thereafter, on advising a petition with answers, adhered.

On this case the Judges were much divided in opinion.

The LORD PRESIDENT observed, that the great rule as to succession was the *lex domicilii*, but that the question as to the mode in which the subjects were to be taken up and vested in the successor must be regulated by the *lex rei sitæ*;—that this had accord-

ingly been decided in the cases Egerton and Craigie;—and that although he was formerly of opinion that the case of Egerton had been erroneously decided, yet he was now satisfied that the judgment was correct.

**LORD CRAIGIE** stated that he had concurred in the judgment which had been pronounced in the case of Egerton, but that he had now considerable doubts as to the soundness of that opinion; and he was desirous that the Court should take the opinion of English counsel.

**LORD BALGRAY** conceived that the Court were excluded from entering into any inquiry as to the soundness of the principle of the decisions which had been pronounced in the cases of Egerton and Craigie.

**LORD HERMAND** also rested his opinion on these cases.

**LORD GILLIES** observed, that if judgment were to be pronounced on the footing of these decisions being conclusive, it was unnecessary to inquire into the principle; but it appeared to him that they were erroneous;—and that if the principle there recognised were adopted, it would produce the most inextricable confusion, because it would be necessary in every case to make inquiries as to what was the *lex rei sitæ*, so as to ascertain whether the funds had vested or not; and that the consequence might be, that they would be divided into an infinite number of parts. He also observed, that it was a mistake to assume in this case, that because the money was vested in the public funds, the decision must be governed by the law of England; for they were not English, but British funds. And with regard to the allegation of the children having received payment of dividends, this could only have the effect to vest those dividends in them, and not the principal sum itself.

*Pursuer's Authorities.*—Dict. *voce* Foreign; 3. Mack. 9; Mack. Oth. 251; 3. Stair, 8. 51; Kames' El. Art. 16; 3. Ersk. 9. 27. 30.

*Defenders' Authorities.*—Egerton, Nov. 27. 1812, (F. C.); Craigie, June 12. 1817; 4. Geo. IV. c. 98.

T. JOHNSTONE,—R. WELSH,—Agents.

No. 291.

J. WRIGHT, Suspender.—*A. McNeill*.

J. M'GREGOR, Changer.—*Monteith*.

*Penalty—Summary Warrant—Master and Servant.*—Penalty in a bond of caution for the performance by an apprentice of the obligations in his indenture, held subject to an equitable restriction.

Feb. 9. 1826.

2d Division.

Lord Mackenzie.

F.

**ROBERT WRIGHT**, a minor, entered into an indenture of apprenticeship, for three years from August 1822, with M'Gregor, the proprietor of a printfield, in which it was stipulated that he should at no time be absent or divert himself from his

'said master's business, without leave asked and obtained;' and that 'for each day's absence, excepting as aforesaid, he shall either pay to his said master two shillings, or shall serve him two days for one at the expiry hereof, in the option of his said master. Both parties bound themselves, but without cautioners, to perform their respective obligations, 'under the penalty of £20 to be paid by the party failing to the party observing or willing to observe the same, attour performance.'—In August 1823 M'Gregor presented an application to the Sheriff of Lanark, stating that Wright had deserted his service, and praying the Sheriff, 'on his confessing, or the petitioner proving the same, to grant warrant for incarcerating him within the tolbooth of Glasgow ay and until he find sufficient caution to return to the petitioner's service, and perform the conditions incumbent on him by the said indenture.' Wright was accordingly apprehended, and brought before the Sheriff for examination, when he emitted a declaration, admitting that he had left his work on account of bad health, and stating that he had returned, and was at work when apprehended. Thereupon, and without requiring any further evidence, the Sheriff granted warrant 'to incarcerate the said Robert Wright within the tolbooth of Glasgow, therein to be detained until he find sufficient caution, acted in the books of Court, that he will return to his service, and implement and fulfil his part of the indenture, and that under a penalty of £10 sterling.' In virtue of this warrant, Wright was immediately committed to prison; and was detained there for two months, at the expiry of which, the suspender John Wright, to whom he was distantly related, obtained his liberation by granting a bond, wherein he bound himself, his heirs, &c. as cautioners for Robert Wright, 'that he shall immediately return to the service' of the said John M'Gregor, and implement and fulfil the conditions incumbent on him by the said indenture, and that under the penalty of £10 sterling to be paid by me, 'in case of the said Robert Wright's failure so to do.' In the August of next year, Wright having again left his service, M'Gregor intimated this to the suspender, who offered to cause the boy to return, or to pay the damage sustained by his desertion. M'Gregor, however, refused to take back the boy, on the ground that he had been implicated in some offence of a criminal nature, ~~he~~ gave the suspender a charge for the full amount of the penalty. Of this charge a suspension was brought, on the general plea, that all penalties were subject to an equitable modification, corresponding to the loss actually sustained. To this it was answered, that although this might hold in regard to pe-

nalties exigible by and attour performance, the case was different where the penalty, as in the present instance, was, by a third party, simple and absolute on the failure to perform, and came therefore to be considered as the estimate of damage fixed by the parties themselves. The Lord Ordinary found, '1. That the charger was not bound to take back his apprentice after a second desertion; but, 2. That the charge in this case ought not to be sustained for a sum greater than the amount of the damages claimable by the charger for the breach of indenture committed after the granting of the bond of caution; and therefore ordained the charger to give in a special condescendence of the amount of the damage which he alleges to be due to him.' His Lordship added this note:—'It seems to the Lord Ordinary that it would be too much to hold the cautioner liable in the full penalty for every breach of indenture; and if not so liable for every breach, it seems sufficient to say that he is not liable for any.' *Vide* case of *Sibbald v. Fletcher*, June 21. 1758.' To this interlocutor the Court adhered, reserving to the Lord Ordinary to consider the legality of the Sheriff's warrant with reference to the terms of the indenture.

**LORD ALLOWAY.**—I know of no case where, in principle, a penalty is not restricted to the amount of actual loss suffered; and I conceive that the one in the present case must, like every other, be subject to modification. In addition to this, although not pleaded by the parties, I think it necessary to express my doubts as to how far the warrant granted by the Sheriff in this case was a legal warrant. So far as any proof before the Sheriff goes, the boy was at his work when he was apprehended; and if an apprentice can thus be detained in prison two months, till he find caution to implement the conditions of his indenture, he may be detained during the whole period of his apprenticeship; and I apprehend that a master has no power to do this.

**LORD PITMILLY.**—I agree in thinking that the Lord Ordinary's interlocutor is right, so far as it goes, in holding that the penalty must be restricted to the actual damage sustained. The case of *Sibbald*, referred to by the Lord Ordinary, is precisely in point. The penalty here is not like that which parties sometimes fix, to avoid litigation, as to the amount of damages, for there is here no agreement of parties, but a judicial penalty fixed by the Sheriff, without any particular amount being asked by the party; and if any penalty should be restricted to the actual loss, it is one of this description. But I doubt whether the interlocutor goes far enough, as I am inclined to think that the whole procedure be-



fore the Sheriff was illegal. The boy here became bound in an indenture, under a penalty of £20, without cautioners. He left his service, but returned, and was in his master's premises when apprehended, and was detained two months in prison on account of failure to find caution, not required by the indenture, to implement all his obligations under it. An apprentice may be summarily ordained to return to his service, but I doubt very much whether he can be compelled, by summary imprisonment, to find caution to fulfil all the conditions of his indenture.

**LORD GLENLEE.**—I have no doubt that the penalty falls to be restricted; but I would have followed a course opposite to that taken by the Lord Ordinary, and thrown the onus probandi on the suspender, who ought to show that the full penalty is exorbitant. In regard to the Sheriff's warrant, I agree in holding it to be illegal in so far as caution is required to implement the whole conditions of the indenture; but so far as regards the obligation to return to service, caution might properly be insisted on, and the charge here is on account of actual desertion.

**LORD JUSTICE-CLERK.**—The question arising as to the legality of the Sheriff's warrant, and of the bond granted in consequence, is one of great importance; and although the effect of it may not be properly now before us, it is impossible for the Court, as it has been brought under their notice, to shut their eyes to such a procedure. Although a summary warrant of imprisonment has been found to be competent, to compel an apprentice to return to his service, it is a very different thing to force him, by summary imprisonment, to fulfil all the conditions of his indenture, not under the penalty therein contained, but under a new penalty of finding caution, which the indenture does not require. If the Sheriff is allowed to do this, it is permitting him to make a new contract for the parties, and enabling him to imprison an apprentice on a summary warrant, although he has not deserted his service. He has, however, no power to do this; and if the bond has thus been illegally exacted, I doubt whether it can warrant a charge on any ground or to any extent whatever.

*Suspender's Authorities.*—Henderson, Feb. 24. 1802, (10054); Sibbald, June 21. 1758, (588.)

*Charger's Authorities.*—Inst. 8. 20. 18; Vinnius, ad. Inst. 634; Ersk. 561; 1. Bank. 473; Kames' Prin. 422. 4; 1. Bank. 473; 1. Bell, 566; 1. Pothier, 157. 161; Stene, July 15. 1637; (8401); Craig, Dec. 16. 1628, (10035); Pollock, July 24. 1777, (Ap. Tack, No. 4.); M'Intosh, Feb. 1. 1798, (F. C. and Ap. Tack, No. 5.); Henderson, Feb. 24. 1802, (10054.)

C. FISHER,—R. KENNEDY, W. S.—Agents.

No. 292. S. RUCKER, Pursuer.—~~Montcriff—More—Marshall.~~  
J. G. C. FISCHER and Others, Defenders.—~~Jeffrey—~~  
~~Fullerton.~~

*Pactum de Quota Litis.*—Contract to advance expenses of a law suit, on receiving a per centage on the sum recovered, held legal, and not voided by the bankruptcy of the party, the advances being still secured,—nor by delay to make these advances, occasioned by the failure of the litigant to implement his part of the agreement.

Feb. 9. 1826.

2D DIVISION.

Lord Mackenzie.

F.

FISCHER and others, inhabitants of the kingdom of Saxony, along with Messrs. Rucker Brothers, merchants in London, as their attorneys, and Mr. Cleghorn, writer to the signet, as the mandatory of the latter, raised actions in this Court, against the Earl of Findlater and others, for payment of certain large sums left to them by the will of the late Earl. As these actions were likely to be attended with great expense, Fischer &c. made an agreement with Messrs. Rucker Brothers, whereby the latter became bound to advance the expenses of the suit, and to transmit to Fischers the sums recovered, whether by judgment or compromise, on receiving a commission of 5 per cent. on such sums, Fischers being likewise bound, at the end of each six months, to repay the advances made by Ruckers. Messrs. Ruckers accordingly for some time made the stipulated advances; but their house, having become bankrupt, the pursuer (one of the partners, or the sole partner) obtained a credit for the purpose of advancing the necessary funds, and Fischers continued to correspond with him in the same way as with the company before their bankruptcy. After a great deal of expensive litigation, a compromise was effected, by which it was agreed that Fischers should receive £55,000 in full of all claims. Thereupon Rucker raised an action against Fischers for payment of the stipulated commission. They admitted their liability to remunerate the pursuer for the risk, trouble, and expense which he had incurred; but they contended that they were not liable for the per centage, in terms of the agreement, on the grounds,—1. That it was unlawful, being *pactum de quota litis*; —2. That being made with Ruckers Brothers, it was voided by their bankruptcy;—3. That the pursuer had not duly implemented his obligations, by making the necessary advances in proper time;—and, 4. That he had, in his letters, thrown up the agreement. To this it was answered,—1. That the agreement was perfectly lawful; that after the bankruptcy of the house, Fischers had uniformly recognised the pursuer as the party, and that he had acted on that faith;—2. That any delay on the pursuer's part to make these advances arose from the defenders failing to remit the amount every six months, according to the

obligation on their part, which failure was clearly proved by the correspondence; and, at any rate, that Mr. Cleghorn, the agent and mandatory, had made these advances on the pursuer's part, so that the progress of the cause was never impeded;—and, 3. That, from the correspondence produced, it clearly appeared that the pursuer had merely threatened to throw up the agreement, if the defenders did not make their remittances more regularly; while the latter, instead of availing themselves of this to break the contract, had promised to take measures for the removal of his causes of complaint. The Lord Ordinary repelled the defences, and found 'that, in terms of the contract libelled, the pursuer 'is entitled to claim from the defenders the commission at the 'rate of 5 per cent. upon the amount of the sum recovered by 'the defenders in the process libelled;' and the Court unanimously adhered.

Their Lordships were of opinion that the contract was perfectly legal, and that the bankruptcy of the house could not void it, as the pursuer continued to procure the necessary advances to be made, and was recognised as the party by the defenders. They were also satisfied by the correspondence that the pursuer had not thrown up the contract, and that any delay to make advances was owing to the Fischers having failed to fulfil their part of the agreement, and was productive of no inconvenience, in consequence of the aid afforded by Mr. Cleghorn.

T. EWART, W. S.—RENTON and GRANT, W. S.—Agents.

J. ALEXANDER, Advocate.—*Sol.-Gen. Hope—Macfarlane.*

No. 293.

D. M'LAY and Others, Respondents.—*Skene—Shaw—*

*A. M'Neill.*

*Poinding.—Bank Notes.—Process.*—1. Circumstances in which it was held competent in an advocacy as to an objection to the mode of proof, to remit with instructions on a question as to the title of the pursuer;—and—2.—Question raised, but not decided, as to the competency of pinding bank notes.

On the 17th of March 1823, M'Lay and others presented a petition to the Sheriff of Lanarkshire, stating that they were cautioners for payment of the rent of a toll, of which William M'Lay was the tenant;—that, on the preceding day, he had delivered £52, in bank notes, to his wife, to be paid to the Road Trustees;—that, while she was in the house, and had the notes in her hands, a sheriff-officer, of the name of Ross, accompanied by one Smith, entered, and seized them, in virtue of a precept of pinding; and that, after valuing 36 one pound notes at £33, they had car-

Feb. 10. 1826.

1st Division.

Lord Eldon.

H.

ried them off as having lawfully poinded them. They therefore prayed for warrant to apprehend Ross and Smith, and to ordain them to restore the notes which had been so carried off. After some procedure the notes were delivered up, and consigned with the clerk of Court. Appearance was then made by Alexander, who stated that he was the creditor on whose behalf the poinding had been executed, in evidence of which he produced the precept and execution of poinding, and a petition which he had proposed to present to the Sheriff as a report of the poinding, but which he had not lodged, and on which no deliverance was written; and he maintained that he was entitled to payment of the money. The Sheriff-Substitute, on the 23d October 1823, 'found that 'the pursuers, David M'Lay and others, have not shown any 'legal or sufficient title to the fund in medio, and that the 'same must belong either to William M'Lay, toll-keeper, or to 'the compeerer John Alexander, provided the poinding, to which 'there appears to be serious objections, be found valid,' and appointed William M'Lay to be called as a party for his interest. Having accordingly appeared and stated, that he had transferred his right to his cautioners, the Sheriff-Depute found 'the poinding in question inept from the admissions of the defender Ross, 'the officer who executed the same, and of the other defender 'Smith, one of the appraisers, and Ross's employer in the business; and that the conduct of both these parties was, from their 'own account of the transaction, grossly irregular and improper 'on the occasion of said poinding; and therefore, and in respect 'of the judicial transference of the compeerer William M'Lay's 'right to the fund in medio in favour of the pursuers, ordained 'the clerk of Court to pay to them the sum consigned.' Ross and Smith acquiesced in this judgment; but Alexander (whose right to appear was disputed) appealed to the Circuit Court, and obtained a remit to the Sheriff 'to consider whether the 'poinding at the appellant's instance is so ineffectual and null as 'to warrant his pronouncing a judgment in this process, by which 'effect should be denied to it.' The Sheriff having required Alexander to show that the requisites of the Bankrupt Statute had been complied with in executing the poinding, and having allowed M'Lay and others a proof e contra, Alexander brought an advocacy, on the ground of objection to the mode of proof, in respect that there was a regular execution of poinding which it was not competent to redargue by parole evidence. The Lord Ordinary having repelled the reasons of advocacy, Alexander presented a petition to the Court, contending that the poinding of bank notes was lawful; that he had produced a regular execution;

and that M'Lay and others, being merely cautioners, had no title to compete with him on the fund *in medio*. The Court having altered the interlocutor, and found that M'Lay and others had 'no title to appear either in this Court or in the 'Inferior Court,' and remitted to the Sheriff to proceed in the petition of Alexander, they reclaimed, and contended, 1. That as the action had been originally brought by them, and as Alexander was not called as a defender, but had made appearance incidentally in the character of a *poinding* creditor, he was bound to show that he had a lawful title to that character before he could be permitted to object to the title of M'Lay and others; that, in order to this, it was incumbent on him to instruct that his *poinding* was lawful; but that a *poinding* of bank notes had never been recognized by the law of this country, and was illegal; that, at all events, the *poinding* had been executed in a manner at variance with the bankrupt statute, and was truly a *spuilzie*; and that the execution was *ex facie* null and void. 2. That as the advocacy had been brought merely as to the mode of proof, it was not competent to decide the question of title;—and, 3. That the petition of Alexander was a production in the process, and not having been conjoined or advocated, a remit, at his instance, was incompetent. To this Alexander answered, 1. That the diligence which he had executed was lawful, and that bank notes were equally as liable to be attached by *poinding* as any other species of moveable property; that, as the statute referred merely to the *poinding* of goods, it did not apply to that of bank notes, so that it was not necessary to observe its requisites, which, in such a case, were impracticable; and that he had produced an execution, which must be sustained until reduced. 2. That although the advocacy had been brought only as to the mode of proof, yet it was competent for the Court to pronounce any judgment which they thought consistent with the justice of the case; and, 3. That the petition at his instance having been presented, a remit was competent. The Court recalled their interlocutor, and remitted 'to the Sheriff of Lanarkshire to refuse the original petition given in by David M'Lay and others, the cautioners for William M'Lay, the toll-keeper, and then to proceed in the process in terms of the Sheriff-Substitute's interlocutor of 23d October 1823; and farther, to decide as to the claim now made by the respondent Alexander for expenses of process against David M'Lay and others, the cautioners foresaid.'

Although the question as to the competency of *poinding* bank notes was fully argued by the parties, yet their Lordships did not deliver

any opinion on that point, nor did they intend to decide it; but rested their decision entirely on the circumstances of M'Lay and others having no title to present the original petition. They appeared also to have no doubt as to the competency of pronouncing a judgment on the question of title, although the advocacy had been brought only as to the mode of proof.

*Advocates' Authorities.*—Rolle's Ab. 667; 2. Bacon, 344; Bradby, 212; Code Civil § 590; Maule, January 1694, (10519); 3. Mack. 6; 4. Stair, 42. 12; 4. Ersk. 2. 6; Tait on Ev. 5; Hamilton, June 12. 1741; Elch. voce Abbey.

*Respondents' Authorities.*—2. Burn. 205; Knight v. Criddle, 9. East; 4. East, 410; 2. Bos. and Pul. 376; 4. Com. Dig. 321; 1. Ross, Tit. Pending; Forbes, Jan. 25. 1751, (Elohes, No. 26. Bankr.); 3. Ersk. 6. 7.

TOD and WRIGHT, W. S.—C. FISHER,—Agents.

No. 294. GEORGE SMITH, Pursuer.—*Skene—Monteith—J. W. Dickson.*  
J. W. ROBERTON and W. JEFFREY, Defenders.—*Forsyth—Greenshields—Jameson—Sandford.*

*Bankrupt Statute—Sale.*—Circumstances in which it was held that a sale of the outstanding debts of a sequestrated estate, in accomplishing which, the statute had not been strictly observed, was sustained.

Feb. 10. 1826.

1st DIVISION.  
Lord Eldin.  
S.

IN 1811, the estates of Fulton Alexander and Company, merchants in Glasgow, were sequestrated under the bankrupt act, and the defender Robertson was appointed trustee. On the 7th of June 1816, he inserted an advertisement in the Edinburgh Gazette, intimating 'that a meeting of the creditors will be held in his counting-house, on Tuesday the 25th current, at 12 o'clock noon, to give instructions respecting the sale of the outstanding debts, and making a final dividend.' On the day when this advertisement appeared in the Edinburgh Gazette, the editor (according to the usual practice in similar cases) sent instructions to the editor of the London Gazette, to insert it in the first one which was to be published, and which was on the 11th of June. It, however, did not appear in the London Gazette till the 15th, a circumstance which, it was alleged, arose from there not being sufficient room for it in the first one. On the 11th, the trustee transmitted a circular letter to the creditors giving a similar notice; and it was alleged by him, that, in particular, he sent one to a Mr. Scott, who was the assignee of George Smith, the father of the pursuer, a creditor on the estate. A meeting was in terms of the advertisement held on the 25th of June, at which the creditors instructed 'the trustee to advertise, and sell off by public roup, all the outstanding debts due in this country, in whole or

'in such lots as he shall judge best'. Neither Scott nor Smith was present at this meeting.

On the 10th of December of the same year, the trustee caused an advertisement to be inserted in the *Edinburgh Gazette*, announcing that the sale would take place on the 12th of February thereafter, and the editor of that paper transmitted it for insertion in the *London Gazette*; but as that paper was not published till the 14th December, it did not appear till that date. Upon the 12th of February, the outstanding debts, amounting to about £18,000, were exposed to sale at the upset price of £50, but no bidder appeared, and the sale was therefore adjourned by the judge of the roup (who was a creditor on the estate) till the 26th of that month. Notice of this adjournment was given in the three *Glasgow newspapers*, but not in the *Gazettes*; and on the day appointed, the debts were, under the sanction of the judge of the roup, (who was a creditor for £15,000,) offered for sale at £20, and were purchased by the defender William Jeffrey, accountant in *Glasgow*, at £27.

At the distance of five years thereafter, and Scott having denounced himself of the debt, Smith, as in right of his father, brought an action of reduction of the sale against the trustee and Jeffrey, on the grounds, 1. That the meeting which was held on the 25th of June 1816 was irregular, because, although it is enacted by the 56th section of the bankrupt statute, that there shall be an advertisement two weeks previous to it, both in the *Edinburgh and London Gazettes*, yet only nine free days had elapsed between the period when it appeared in the *London Gazette* and the date of the meeting. 2. That, supposing the meeting to have been regular, it was necessary that two months previous notice of the sale should have been published in both *Gazettes*, whereas the advertisement did not appear in the *London Gazette* till the 14th of December 1816, and the day of sale was fixed for the 12th of February, being two days short of the statutory period; and no notice of the adjournment was given in either of the *Gazettes*; and, 3. That even although the sale had been accomplished in terms of the statute, yet Jeffrey was disqualified from being a purchaser, because it was offered to be proved, that, prior to the sequestration, he had been employed for two years by a committee of the creditors acting under a trust-deed, to superintend the management of the estate;—that after the sequestration, he was continued in this employment by the trustee, who was guided in all matters by his advice;—that the sederunt-books were kept by him, and were either in his own handwriting or that of his clerk, and that the list of outstanding debts was made out

and valued by him. In defence it was pleaded by the trustee, 1. That the pursuer being a single creditor whose interest was extremely small, and who could not allege that he had suffered any real injury by the sale, had no title to pursue; and that such an action could only be competently maintained by the trustee as the representative of the creditors in general; 2. That the provision in the 56th section related to a sale after the lapse of 18 months from the date of the sequestration, whereas the sale in question had been made after the expiration of more than three years, and was to be judged of by the 75th section; which made it competent after that period to sell the outstanding debts under the authority of a meeting of the creditors, to be held immediately thereafter, without any specific notice of such sale being given, and therefore the objection of the pursuer was not well-founded; 3. That as the pursuer had not complained within the statutory period of the resolutions of the creditors to sell the debts, and as he did not conclude in this action for reduction of them, they must be held as forming a proper authority for the sale; 4. That the objection as to the advertisements relative to the sale was not well-founded, even supposing the 56th section were applicable, because, as the advertisement had appeared in the London Gazette on the 14th of December, and the sale was appointed for the 12th of February, two lunar months had intervened, and that as the words of the statute in this section were merely 'two months,' it must be held that it was two lunar and not two calendar months which were required; and, 5. That the sale having been actually made,—an assignation granted,—the price paid, and divided among the creditors,—and the pursuer being resident on the spot where the proceedings occurred,—and having made no objection for five years, he was barred by homologation and acquiescence from objecting to the sale.

By Jeffrey, the purchaser, it was stated in defence, 1. That although he had been employed as an accountant to examine the books of the bankrupts, while the estate was under the private trust, and although he had communicated any information which he possessed to the trustee under the sequestration, yet he denied the other allegations of the pursuer, or that he held any official situation which could disqualify him from purchasing; and, 2. That being a *bonâ fide* purchaser, he could not be affected by any neglect on the part of the trustee to observe the requisites of the statute; and that the pursuer, if he could qualify any damage, must look to the trustee for redress.

In answer to these defences the pursuer contended, *inter alia*, that as the meeting had not been called, on the expiration of two



months after the lapse of three years from the date of the sequestration, but had been held at the distance of five years, it was impossible to maintain that the sale had been made in virtue of the 75th section; that if so, it must have been under the 56th section; and that it was evident from the terms of the statute itself, independent of the rule of the common law, that it was two calendar months which was intended by the Legislature. The Lord Ordinary repelled the reasons of reduction and assolzieid the defenders; and the Court, on advising a petition and answers, adhered. The pursuer having reclaimed, the Court by a majority altered, and decerned in terms of the libel. The trustee and Jeffrey having petitioned against this judgment, the Court (also by a majority) altered, and adhered to the interlocutor pronounced by the Lord Ordinary.

On this case there was a great variation of opinion on the Bench. At the first advising, Lord Craigie alone was of opinion that the sale ought to be reduced, but at the second advising Lords Hermand and Balgray also thought it objectionable. At the third advising, however, they returned to their original opinions, and concurred with the Lords President and Gillies in assolzieing the defenders. LORD CRAIGIE proceeded on the ground that as the sale could only be made in virtue of the statute, it was necessary that the requisites of it should be exactly observed, whereas it was admitted and proved that this had not been done.

LORDS HERMAND and BALGRAY also rested on those grounds at the second advising; but the former came afterwards to be of opinion that the pursuer was barred from objecting to the sale; and the latter held that it was to be regulated by the 75th section,—that third parties were entitled to rely on the requisites of the statute having been observed;—that if the trustee had violated his duty, the pursuer might have his relief against him, and that it was impossible to permit him, after the lapse of so long a period, to overturn all the proceedings on an objection of so critical a nature, and which had arisen from an accidental delay, for which the trustee was not responsible.

The LORDS PRESIDENT and GILLIES were of the same opinion; and the Judges unanimously held, that by the law of Scotland the word month meant a calendar and not a lunar month.

*Pursuer's Authorities.*—(3.)—4. Dow, 379; 2. Bell, 312; 8. Ves. Jr. 227.

*Trustee's Authorities.*—(1.)—2. Bell, 444;—(4.)—2. Blackstone, 9. 1; 2. Christian on B. L. 27;—(5.)—Lombe, Nov. 17. 1779, (5627); Ayton, July 1. 1800, (No. 5. Ap. Prop.); Ayton, May 19. 1801, (No. 6. lb.); L. Abercorn, May 20. 1820, (F. C.)

J. CRAWFORD, W. S.—T. JOHNSTONE,—Agents.

No. 295.

*R. HERRIOT, Advocate.—Moncrieff—Maidment.**ADMIRAL HALKET, Respondent.—Baird.*

*Landlord and Tenant.*—A tenant getting neither straw nor dung at his entry, and being taken bound to leave a year's dung as steelbow at his removal, on being allowed the 'price' of the dung so left, held entitled to its full value.

Feb. 10. 1826.

2d DIVISION.  
Lord Cringetie.  
F.

HERRIOT, and his father now deceased, took a lease of the farm of Swinton Mains from Admiral Halket, at a rent of £740. At their entry they got neither straw nor dung from the outgoing tenant, and it was stipulated by the tack, 'that they shall consume the whole straw yearly on the ground with their cattle, and shall leave the straw of the last crop with a year's dung, and a fifth part of the tillage land for a fallow-break, for the use of the proprietor or incoming tenant. But although the straw is declared steelbow, the tenants are to be allowed the price of the year's dung to be left for the fallow-break, as the same shall be valued by mutual men.' At the expiry of the lease, Herriots entered into a submission with the incoming tenant to two arbiters, who ascertained the quantity and fixed the value of the dung, but declined to determine a point disputed by the parties, viz. whether, under the lease, Herriots were entitled to full or half value for the dung, as being a question of law? Admiral Halket then presented a petition to the Sheriff of Berwickshire, praying him to appoint neutral men to value the dung, and, upon his paying or allowing it out of the rent, to find and declare that the tenants had no further claim against him on that account. At the same time he did not dispute the quantity or value of the dung as already fixed; but he contended, that as the tenants could not have sold the year's dung, which he was obliged to reserve and leave on the farm, but could only have had the benefit of it for one crop, he could not, either in law, or according to the custom of the country, claim more than half price. After taking the reports of several respectable farmers, the Sheriff found the tenants entitled to three-fourths of the value of the dung. Herriot then brought an advocacy, and the Lord Ordinary advocated the cause, and found, 'that upon the respondent allowing the advocator full value for the dung in question, with the interest due thereon, the advocator has no further claim upon the respondent for said dung.' The Court unanimously adhered.

J. J. FRASER, W. S.—J. WAUCHOPE, W. S.—Agents.

C. CRAIGIE, Suspender.—*Maidmont*—*A. Lothian*.J. MILL, Charger.—*Graham Bell*.

No. 296.

*Stat. 25. Geo. III. c. 51.—4. Geo. IV. c. 26.—Suspension.*—A bill of suspension of a conviction under the above statutes, relative to the post-horse duties, refused as incompetent.

Feb. 11. 1826.

1st Division.

Bill-Chamber.

Lord Eldin.

D.

By the 4. Geo. IV. c. 26. it is enacted, that 'every person letting for hire or using any horse, mare, &c. for drawing any such coaches or other carriages to be used as hackney coaches, any distance not exceeding five miles from the general post-office of any city,' &c. shall pay a duty of 5s. per week, when the coach is drawn by two horses; and it is further provided, that 'the person or persons letting for hire or using any horse, mare, or gelding for drawing any such coach or carriage, as or in the nature of a hackney coach, shall take out a license, expressly authorizing him, her, or them, so to do.' By the 25. Geo. III. c. 51. (which relates to the same subject, and of which the above statute is supplementary,) it is enacted, 'that it shall and may be lawful to and for any Justice of the Peace residing near the place where the offence shall be committed, to hear and determine any offence against this act,' &c. and to subject the defendants in certain penalties; but it is declared, that 'if any person or persons shall find himself, herself, or themselves aggrieved by the judgment or sentence of any such Justice, then he, she, or they shall and may (upon finding security for the penalties and costs) appeal to the Justices of the Peace at the next general Quarter Sessions for the county,' &c. And it is declared by the 4. Geo. IV. c. 26. 'that no such proceeding so to be had or taken shall be quashed or vacated for want of form, or removed by certiorari, &c.; nor shall any such proceeding before such Justice be taken or removed by certiorari, suspension, advocacy, or reduction, or by any other writ, process, or proceeding, into the Court of Session, Court of Exchequer, or Court of Justiciary in Scotland, any law or statute to the contrary notwithstanding.'—Mill, as farmer of the post-horse duties in Scotland, filed an information before one of the Justices of Peace for the county of Edinburgh against 'Charles Craigie of Edinburgh, coach-hirer,' stating that he had violated the 4. Geo. IV. by letting for hire two horses, without having a license in terms of the statute. The messenger, in citing him, called him 'Charles Craigie senior,' to distinguish him from his son of the same name, and who was also in the same occupation. Craigie appeared before the Justice on the day of citation; but the diet

being adjourned, he was again cited to the day then fixed, and there having been another adjournment, he was of new cited; and having appeared, he was convicted by the Justice upon his own admission, and upon the oath of a credible witness, and found liable in the statutory penalty, which was modified to £2. 10s. He then presented a bill of suspension, the competency of which he maintained on the ground of excess of powers,—1. Because the Justice had sanctioned the citation given by the messenger, containing the word ‘senior,’ which was not in the information;—2. Because it was not competent to cite him to three different diets on the same warrant;—and, 3. Because it was declared by the above statutes, that nothing contained in them ‘shall be construed to extend to coaches or carriages which are or hereafter may be subject to the provisions contained in any local act or acts of Parliament;’ and as the hackney coaches of Edinburgh (of one of which he was the driver) were under the regulation of the police statute of that city, the Justice had gone beyond his powers in extending the statute to this particular case. To this it was answered, that the bill was incompetent, and there was no excess of powers,—1. Because the objection to the citation had not been made before the Justice, was not well founded on the merits, and the statute declared that no proceeding should be quashed for want of form;—2. Because the diets being adjourned, the suspender was bound to have attended without any new citation, and therefore he could not complain of having received additional warning;—and, 3. Because the exception of the statute related to the regulation of hackney coaches, and not to the duties payable, and the licenses to be taken out as to the horses. The Lord Ordinary, ‘in respect of the plea of the suspender, that the sentence complained of exceeded the power of the Justice, and that no satisfactory answer has been made to that plea,’ passed the bill upon caution. But the Court altered, and remitted to refuse it as incompetent; in respect the suspender had not appealed to the Quarter Sessions.

*Charger's Authorities.*—Cook, May 17. 1823, (ante, Vol. II. No. 295); Campbell, June 23. 1823, (ante, Vol. II. No. 418.)

J. KNOX,—LOW and RUTHERFORD, W. S.—Agents.

E. TURNER, Advocate.—*Sol.-Gen. Hope—Whigham.*

No. 297.

GIBB and M'DONALD, Respondents.—*Jeffrey.*

6. Geo. IV. c. 120.—*Process—Judicial Examination.*—A bill of advocacy against an interlocutor of a Sheriff, ordering a judicial examination of a party, refused as incompetent, and held not to fall under the 40th section of the above statute.

GIBB and M'DONALD, merchants in Edinburgh, having arrested certain goods as the property of their debtors Paul Wathen and Company, Turner presented a summary petition to the Sheriff of Edinburgh, stating that the goods belonged to him, and praying for delivery of them. On the other hand, Gibb and M'Donald alleged that they were truly the property of their debtors, and that Turner was acting collusively to defeat their rights, which they stated would be established by a judicial examination of him. After some proceedings, the Sheriff having appointed him to appear and be examined, he presented a bill of advocacy, which the Lord Ordinary during the recess refused as incompetent, on the grounds (explained in a note) that, 'as the order for the examination of the petitioner is an interlocutory sentence, the Lord Ordinary presumes it has been supposed to fall under the provision, section 40, of the Judicature Act; but the examination of a party does not seem to be the proof, in the view of the Legislature, for which that enactment was made. If the Court had been sitting, the Lord Ordinary would have felt it his duty to take their opinion on the point, in order, authoritatively, to settle the due interpretation and effect of the clause in the statute; but as this is not in his power at present, and having no doubt in his own mind, he has disposed of the bill.' Turner having presented a reclaiming note, the Court, after hearing parties and consulting with the other Judges, adhered to the interlocutor of the Lord Ordinary, on the grounds expressed in his note.

Feb. 11. 1826.

1st Division.

Bill-Chamber.

Lord Medwyn.

D.

T. BRUCE JUN. W. S.—RITCHIE and MILLER,—Agents.

No. 298.

J. THOMSON, Pursuer.—*Jameson—A. Wood.*J. M'ANDREW, Defender.—*D. of F. Cranstoun—Cuninghame.*

*Process—Multiplepoinding.*—An arrestment having been executed in the hands of a private trustee for behoof of creditors, as being debtor to the bankrupt private nominee, and a multiplepoinding having been brought in his name, qua trustee, this process dismissed as incompetent.

Feb. 11. 1836.

1st Division.

Lord Eldon.

S.

Dr. Ross having become insolvent, executed a trust-disposition of his whole funds and estate, for behoof of his creditors, in favour of Thomson. The majority of the creditors having acceded to the trust, Thomson, in virtue of the conveyance, entered into possession, and incurred obligations as trustee. M'Andrew, a creditor of Dr. Ross, and who had not acceded to the trust, executed an arrestment in the hands of Thomson as debtor private nominee to Dr. Ross; and he then raised a multiplepoinding in the name of Thomson, to which he called himself alone as a defender. To the competency of this action Thomson objected,—1. That the summons was made to proceed on the statement that he was the holder of a fund in the character of trustee for the creditors of Dr. Ross, whereas the arrestment was executed in his hands as debtor private nominee to that gentleman;—and, 2. That, qua trustee, he was not debtor to Dr. Ross, but was debtor and accountable to his creditors; and, therefore, not being debtor to Dr. Ross, it was incompetent to arrest in his hands, and to make a claim against him by raising a multiplepoinding in his name, and in his character of trustee. The Lord Ordinary sustained the objections stated by the said John Thomson, as being only 'nominal pursuer of the action, and to the incompetency of the action,' dismissed it accordingly, and the Court adhered.

J. MACDONELL, W. S.—Æ. M'BEAN, W. S.—Agents.

No. 299.

W. TAYLOR, Advocate.—*Jeffrey—Shaw.*G. TAYLOR and Sir W. C. FAIRLIE, Respondents.—*Keay—Buchanan—Moir.*

*Landlord and Tenant—Bankrupt.*—Circumstances in which it was held, that a lease having been granted to three tenants, excluding assignees, and two of the tenants having, without consent of the landlord, assigned their interests to the other tenant, and he having been deprived of possession during his absence from Scotland, and his estates being sequestrated, he was not entitled, in a question with the landlord and the co-tenants, to be restored to possession, although he offered caution for implement of all the obligations incumbent on him.

Feb. 11. 1836.

1st Division.

Bill-Chamber.

Lord Medwyn.

H.

IN 1812, John, William, and George Taylors entered into leases with Sir W. C. Fairlie, by which he let to them 'and their heirs, but excluding assignees and subtenants, under whatever denomination, legal or voluntary, without the concurrence of the

'proprietor in writing,' the coal in the lands of Fairlie for twenty-four years, and the farm of Peatland. Possession was accordingly taken; and by an agreement in 1814, John and George Taylor, for certain onerous causes, made and constituted 'the said William Taylor, his heirs and donators, our lawful cessioners and assignees in and to our two third parts or shares in the two tacks, in part before narrated, during the whole years and terms thereof to run, from and after the term of Martinmas 1813 as to the said farm of Peatland, and the 1st day of June 1814 as to the coal,' and to the whole profits and emoluments which might thence arise. In virtue of this assignation, which, however, was not consented to by the landlord, William obtained the exclusive possession of the coal and farm. Having become insolvent, he executed in 1816 a conveyance of his estates to trustees, who took possession of the coal, but soon thereafter abandoned it; and the possession was resumed by him. During a temporary absence from Scotland in 1818, a summary petition was presented by John and George Taylor to the Sheriff of Ayrshire, stating, that as the trustees had abandoned the possession, and William had left the country, it was necessary that some one should be appointed to manage the coal and farm; and they prayed that they might be authorized 'to carry on said collieries, and to cultivate and set the lands, repair the houses and fences, and do every thing for the interest of all parties, and to keep proper accounts.' The Sheriff granted a warrant of service on induciæ of six days, and it was executed edictally at the pier and shore of Leith, and market-cross of Edinburgh. No appearance having been made for William Taylor, the Sheriff granted the prayer of the petition 'quoad the care of the subjects in dispute;' and thereafter, on the application of John and George, remitted to inspectors to examine and to report as to the coalworks and farm. This was accordingly done as to the coalworks; but no report was made as to the farm, and no new warrant was granted to John and George Taylor. On his return from Ireland, William presented a petition to the Sheriff, praying to be restored to possession; but his estates having been sequestrated under the bankrupt act, this application fell asleep. At the distance of three years thereafter, and John Taylor being now dead, William presented a new petition to the Sheriff, to which he called as parties the landlord, the heir of John, and George Taylor; and prayed for authority to resume the possession, 'of which he had been deprived. In defence, it was pleaded by the landlord, inter alia, that as the original tacks excluded assignees and subtenants, and as William claimed possession as an assignee, he was not bound to receive him; and this the more especially, as his

estates were still under sequestration. By George Taylor it was contended, that as he was bound to the landlord for payment of the rents, and as the considerations stipulated in the assignation had not been implemented, he was entitled to make the application to the Sheriff for possession of the subjects; and that as William was unable to perform the stipulations in the tacks, he had no right to demand possession. To this it was answered by William,—1. That as he had acquired possession in virtue of a regular lease granted by the landlord to him and the other two tenants, that lease afforded to him a sufficient title of possession in a question with the landlord; that, having been in possession, he could only be removed by means of a competent process; and there having been no such process, he was entitled to be restored to possession, on the principle that *spoliatus ante omnia restituendus est*.—2. That, in relation to the other tenants, the assignation was a sufficient title to exclude them from possession, and to warrant him to maintain it on his own behalf—that the application which they had made to the Sheriff was irregular and incompetent—that he had not been duly cited, seeing that he had not been absent forty days from Scotland, and the edictal citation was made without a warrant, and on induciæ of six days;—and, 3. That although his estates were under sequestration, yet the trustee and creditors were excluded, by the terms of the leases, from claiming possession, and they had abandoned all right to them. The Sheriff, in respect of the sequestration, and the terms of the lease, and that William had bound himself to pay the rents, dismissed the process. William Taylor then presented a bill of advocacy, which the Lord Ordinary refused, ‘in respect that the bill is offered without caution, and separatim in respect that the complainer can have no right to claim possession, exclusive of the other lessees, except in virtue of an assignation, which their title expressly debars, and which the proprietor objects to; and further, that the coal lessees are not bound to yield the possession to a bankrupt whose estate is sequestrated, and whose trustee does not concur in the application, unless he find caution for the obligations incumbent by him to the landlord, which he does not offer to find.’ Having offered a second bill, with caution for implement of the obligations contained in the lease of the coal, so long as the cautioner should continue in the management of it, the Lord Ordinary reported it on Cases; and thereafter, having further offered unqualified caution, the Court adhered.

C. F. DAVIDSON, W. S.—J. ANDERSON, W. S.—R. BURNETT, W. S.—  
Agents.



A. M'ALLISTER, Suspender.—*Graham Bell.*

No. 300.

J. SCOTT, Charger.—*Cuninghame.*

*Jurisdiction—Justices of Peace.*—Held,—1—That it is incompetent for Justices of Peace of one county to indorse a civil warrant on a decree of the Small Debt Court of another county;—and,—2— That an apprehension and imprisonment in virtue of such indorsement is illegal.

SCOTT obtained a decree from the Justices of Peace of Lanarkshire, under the Small Debt Act, against M'Allister, farmer at Woodhead in that county. A charge for payment was executed against him at his 'dwelling-place, Woodhead,'—and Scott thereafter obtained from the Justices a warrant of imprisonment. M'Allister having in the mean while removed into the neighbouring county of Dumbarton, Scott applied to the Justices of that county for their concurrence, which they granted; and M'Allister was accordingly apprehended by constables of Dumbartonshire, and delivered over at the border to those of Lanarkshire, by whom he was conveyed to prison. After lying some time in gaol, he presented a bill of suspension and liberation, on the ground that it was illegal to execute the warrant of the Justices of Lanarkshire in the county of Dumbarton, and that consequently the imprisonment was contrary to law. The bill having been passed, and the Lord Ordinary having reported the cause on minutes of debate, the Court unanimously suspended the letters simpliciter.

Feb. 11. 1826.

2d Division.

Lord Cringetie  
M'K.

LORD JUSTICE-CLERK.—At common law, the procedure resorted to here would be quite extravagant, and it would require the most express words of the Legislature to sanction it; but there are no provisions in any act of Parliament authorizing such a mode of proceeding.

The other Judges concurred.

J. and J. USHER,—A. P. HENDERSON,—Agents.

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The Court, on the report of Lord Medwyn, held that it was competent, after the record was closed, to grant a diligence for recovery of writings in support of the allegations of the parties in their condempence and answers; but under this qualification, that the writings were not in the custody, nor within the power of the party demanding the diligence, and so capable of being produced by him without the aid of such a compulsion.

No. 301. W. G. SCOTT and Others.—*D. of F. Cranstoun—Moncreiff—Show.*

A. CROMBIE.—*Fullerton—More.*

J. NAPIER.—*Greenshields.*

### Competing.

*Fes and Liferent.—Competition.*—A party having sold his estate to his son-in-law, under burden of the price, payable at certain stipulated periods; and having declared that the interest of part of the price should be liferented by his son-in-law and his wife, and the property vested in their children, (of whom one was then alive,) and the price not having been paid—*Held*.—1.—That the fee belonged to the children, and not to their parents;—and, 2.—That they were preferable on the price to the heirs ab intestato of the seller.

Feb. 14. 1826.

1st Division.

Lord Alloway.

8.

THE late William Glendonwyn, proprietor of the estates of Parton and Crogo, entered into a transaction with his son-in-law, Mr. Scott, by which he agreed to sell the property to him, under burden of the price. This was carried into effect by a missive, by which Mr. Glendonwyn conveyed the estate to Mr. Scott, who bound and obliged himself to 'make payment to the said William Glendonwyn, and his foresaids, of the sum of £60,500 sterling, as the price of the said lands and estates in the parish of Parton, at the terms, in the way and manner, and by the proportions after mentioned; viz. the sum of £20,500 sterling at any time upon receiving one year's previous notice after the said term of entry, the said William Glendonwyn discharging the said estate from the burden of this said sum upon receipt thereof; and the sum of £20,000 sterling at the expiry of one year after the death of the said William Glendonwyn, with the interest, at the rate of 4½ per cent., of the said sums of £20,500 sterling and £20,000 sterling, before mentioned, from the said term of Whitsunday 1810 to the respective terms of payment before written, and in all time thereafter, during the not-payment.' And further, 'declaring, that, during the life of the said William Glendonwyn, no interest shall be payable by the said William Scott upon the remaining sum of £10,000, which principal sum of £10,000 sterling is to be secured to the said William Scott and Mrs. Ismene Magdalene Glendonwyn alias Scott, daughter of the said William Glendonwyn, and spouse of the said William Scott, in manner following; viz. The interest of the said sum is to be liferented by the said William Scott, and Mrs. Ismene Magdalene Scott his spouse, during their lives, and during the life of the survivor of them; and the said principal sum of £10,000 to be the property of, and divisible

' amongst the issue of the marriage, male and female, as their said  
' parents may jointly direct by any settlement under their hands,  
' and in default of such direction amongst the said issue, as the  
' survivor may direct by deed or will, and in default of issue, as  
' the said Mrs. Ismene Magdalene Glendonwyn alias Scott may  
' direct by her own will and settlement: And further, the said  
' William Glendonwyn, out of the said interest, promises to pay  
' to his daughter, the said Mrs. Ismene Magdalene Glendonwyn  
' alias Scott, during his life, the sum of £200 sterling yearly  
' for her own separate use, free from the debts or control of her  
' present or any future husband, as in the nature of pin-money;  
' and further, that the said sum of £200 sterling yearly is to be  
' secured to the said Mrs. Ismene Magdalene Glendonwyn Scott  
' in like manner, by the sum of £4000 sterling being retained out  
' of the said sum of £30,000 sterling; and the said sum of £4000  
' sterling shall be the absolute property of the said Mrs. Ismene  
' Magdalene Glendonwyn Scott, and which she shall have the  
' power of conveying and settling at her pleasure, to take effect  
' after her death: Declaring always, that the disposition to be  
' granted by the said William Glendonwyn of his said lands and  
' estate in the parish of Parton shall be specially burdened with  
' the payment of the foresaid price of £60,500 sterling, and all  
' interest to become due thereon, payable in manner before sti-  
' pulated; and the same shall remain a real lien and nexus over  
' the said lands and estates, and preferable to all other debts and  
' debts.' A few days prior to the execution of this missive, Mr.  
Glendonwyn had addressed a letter to his agent, in which, in re-  
ference to it, he stated that 'I find it expedient to delay no  
' longer making a settlement of my affairs, and in that measure  
' have proposed a transaction with one of my sons-in-law, Wil-  
' liam Scott, Esq. barrister, for the estate of Crogo.' At this  
time there was a son in existence of the marriage between Mr.  
Scott and Mr. Glendonwyn's daughter, and soon thereafter Mr.  
Glendonwyn died, having made no other settlement of his affairs,  
and having left three daughters, namely, Lady Gordon, Miss  
Glendonwyn, and Mrs. Scott. After an unsuccessful attempt on  
the part of Lady Gordon to set aside the transaction, a disposi-  
tion, in terms of the missive, was executed in favour of Mr. Scott,  
in virtue of which he was infeft, and obtained possession. Having  
afterwards become insolvent, and having paid no part of the price,  
a process of ranking and sale of his estates was instituted, in  
which various claims were made, and in particular a claim was  
lodged by Mr. Crombie, as assignee and on behalf of Lady Gor-  
don, one of the three heirs-portioners, for a third share of the

price, and another by Mr. Napier of Mollanee, as assignee of Mrs. Scott's third share, and also as having right to the £10,000. The common agent having ranked Napier as in right of the £10,000, and made it preferable to the claim of Lady Gordon, appearance was entered by the children of Mr. Scott, who insisted that the £10,000 belonged to them, and objections were stated on behalf of Lady Gordon to the mode of ranking. The Lord Ordinary having reported the case on informations, it was contended by Napier, that the fee of the £10,000 was vested in Mrs. Scott. In support of this he pleaded, that although, *ex figura verborum*, the property was in the children, yet, as it was declared that the £10,000 were 'to be secured to the said William Scott and Mrs. Ismene Magdalene Glendonwyn alias Scott,' the fee must be held to have been vested in them, and that, as the funds had come from her father, she must be considered as the sole fiar, and therefore he, as her assignee, had right to it. To this it was answered by the children,—1. That the assignation on which Napier founded, conveyed only Mrs. Scott's share as an heir-portioner, and not the specific sum of £10,000, and therefore he had no title on which to compete for this sum.—2. That it was evident, from the whole tenor of the deed, that it was the intention of Mr. Glendonwyn that the £10,000 should belong to them; that accordingly he declared that the 'property' of that sum should be vested in them, and that their parents should only have right to the interest during their lives, with a power of division, and a substitution to Mrs. Scott in the event of failure of issue.—3. That, independent of the intention of Mr. Glendonwyn, the legal construction of the deed was in their favour, because one of the children having been in existence at the date of its execution, the fee immediately vested in him, subject to the emerging claims of future issue;—and, 4. That at all events, as there was no conveyance of the capital sum itself to the parents, but merely of a right to the fruits, it remained in *hæreditate jacente* of Mr. Glendonwyn, liable to be taken up by the children at any period as heirs of provision.

On the part of Lady Gordon it was contended,—1. That whether the fee belonged to Mrs. Scott or to the children, the £10,000 could not be ranked preferably to her share of the price as an heir-portioner, and as such a creditor of Mr. Scott;—and, 2. That, on the contrary, she had right to a preference, because the missive being a deed *inter vivos*, conveying the estate to Mr. Scott under condition of payment of the price, and he having failed to do so, neither he nor his family could make any claim until he had implemented his part of the transaction. To this it was answered

by the children, that the missive was to be regarded as a combination of two deeds,—the one relating to the sale of the property, and the other being a settlement by Mr. Glendonwyn of his affairs; that in this question it was to be regarded in the latter view; and that Mr. Glendonwyn having bequeathed to them the £10,000, they, as special legatees, were entitled to payment, in preference to the heirs ab intestato. The Court found, 'that the fee of the sum of £10,000 provided by the deceased William Glendonwyn, Esq. in the instrument mentioned in process, dated 22d April 1809, belongs to William Glendonwyn Scott, and the other children of the said William Scott, and Ismene Magdalene Glendonwyn, his spouse; that John Napier has no right to the said sum, and repelled his claim thereto; sustained the objections made by the said William Glendonwyn Scott and the other children, and their tutor ad litem, to the ranking proposed by the common agent: Found that they are entitled to be ranked upon the fund in medio, preferably to the heirs-portioners of the said deceased William Glendonwyn, and those deriving right from them, for the said principal sum of £10,000 payable at the death of the last survivor of their said parents, with the lawful interest thereof during the not-payment, and ordained them to be ranked accordingly.' To this interlocutor the Court adhered, on advising petitions with answers.

**LORD BALGHAFF.**—The title on which Napier founds does not convey to him the £10,000, so that he may be thrown out of the case; but, independent of this, the £10,000 clearly belongs to the children, and not to Mrs. Scott. The words of the deed are very remarkable, and it is impossible to peruse them without being satisfied that it was the intention of Mr. Glendonwyn that the £10,000 should belong to the children, and not to their parents. Indeed he expressly limits their right to the interest, and he further states that this interest is to be liferented by them, which is quite exclusive of the idea of vesting a fee in them. In relation to the question with Lady Gordon, it appears to me, that the £10,000 being specially appropriated to the children out of the fund, they must be preferred to the heirs ab intestato.

**LORDS HERMAND and CRAIGIE** concurred.

**LORD GILLIES.**—I am of a different opinion, and it seems to me to be impossible, in consistency with the former decisions, to hold that the fee is in the children, and not in the parents. The deed expressly bears that the money is to be secured to Mr. and Mrs. Scott, and failing issue, that it is to be at her disposal. Some stress is laid on the word 'property;' but it has been repeatedly held, that a conveyance to parents in liferent, and children in fee,

does not vest the fee in the children. But the word 'property' is not stronger than 'fee.' If a trust had been created, the case would have been different; but this was not done, and, on the contrary, a right of disposing of the £10,000 was, in a certain event, bestowed on Mrs. Scott. With regard to the preference over Lady Gordon, it appears to me that there is no foundation for it. It is a mistake to say that the missive is to be regarded as a mortis causa deed;—it is a contract, and until the conditions of that contract be implemented, no right can be claimed under it, either by the purchaser or his family. The £10,000 were clearly given by Mr. Glendonwyn on the faith that the price was to be paid; and if he had contemplated that this would not have been done, he in all probability would not have given this money; and assuredly he would not have preferred these children to his own.

**LORD PRESIDENT.**—I concur with the majority of the Court, and I am not disposed to extend the subtleties of the feudal law to cases such as this. Indeed I have always thought that it was contrary to principle to apply that law to money provisions. The intention, however, is perfectly clear in favour of the children, and the words of the deed exclude the application of the feudal principle on which Lord Gillies rests his opinion. There is no conveyance to the parents and children in fee and liferent; on the contrary, the interest alone is given to the parents, while the subject out of which that interest is to be paid is conveyed to the children. As to the other part of the case, I also agree with the majority of the Court; and although it may no doubt be true that Mr. Glendonwyn might have made another arrangement, had he foreseen a bankruptcy, yet this argument might be applied in every case where a similar event occurred, and cannot influence our decision as to the nature of the right bestowed by the deed.

*Scott's Authorities.*—(2.)—Bell's Cases, p. 55; Newlands, July 9. 1794, (4294); M'Intosh, Jan. 28. 1812, (F. C.);—(3.)—Gerran, June 14. 1781, (4402); Signet Cases, p. 56.—(4.)—1. Bank. 9. 16; 3. Ersk. 8. 2; 3. Ersk. 3. 91.

*Napier's Authorities.*—(3.)—Stair, 828; Mack. 283; 1. Bell, 48; Erug. Nov. 26. 1735, (4246); Lillie, Feb. 24. 1741, (4267); Douglas, July 7. 1761, (4269); Cuthbertson, March 1. 1781, (4279); Dict. Fiar Ab. and Lim. and Prov. to Heir, &c.

**DONALDSON and RAMSAY, W. S.—J. MORISON, W. S.—R. RUTHERFORD, W. S.—A. GOLDIE, W. S.—Agents.**

JOHN FLOUNDERS Senior, Pursuer.—*Maidment.*JOHN FLOUNDERS Junior, Defender.—*Shaw.*

No. 302.

*Judicial Reference.*—Circumstances in which it was held, that a party who had agreed to a judicial reference was barred from objecting that he had not been heard before the referee on the effect of a proof taken by him.

JOHN FLOUNDERS senior having brought an action of reduction of certain title-deeds against his son on various grounds, which resolved into a question of fact, a mutual minute was lodged, by which they agreed to refer the conclusions of the action to Charles Ross, Esq.; whom failing, to Alexander Irving, Esq. advocates. In consequence of this, the Lord Ordinary remitted to one or other of these gentlemen 'to consider this process, hear the parties or their counsel or agents, take such evidence as either of them may see proper, and do in the matter as he may see just, and report his opinion thereon to the Lord Ordinary.' Mr. Ross having declined, Mr. Irving accepted of the remit, and before proceeding to the proof, he required the parties to state whether they wished to have it taken down ad longum, or whether they would agree that he should take such notes of the evidence as might be requisite to guide him in framing his report. Both parties having consented that he should follow the latter course, the evidence was taken in that manner. After the proof was terminated, and in order further to expiscate the truth, Mr. Irving examined each of the parties separately, and thereafter reported to the Lord Ordinary that he was of opinion that the defender ought to be absolved. The pursuer then objected; that Mr. Irving was bound to have heard the parties by their counsel or agent before making his report, and he alleged that, with this view, he had applied to the clerk of that gentleman for a copy of the proof, but that he had been unable to obtain it. He therefore contended, that, according to the decision in *Glenzie v. M'Phail*, he was entitled to be heard on the proof before the Lord Ordinary. To this it was answered,—1. That as the pursuer had specially dispensed with the proof being taken ad longum, and had agreed that Mr. Irving should merely preserve memoranda for his own use, he must be held to have passed from his right to be heard on the proof.—2. That at all events, as he had thus rendered it impossible to have any discussion on the proof before the Lord Ordinary, he was not entitled to place the defender in a more disadvantageous situation than he would have been, if the pursuer had not so consented;—and, 3. That it was not true that he had applied for a copy of the proof, and he had

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enjoyed a full opportunity of representing his case as favourably as he thought fit, when he was examined by Mr. Irving. The Lord Ordinary repelled the objection, and, in respect of the report, assoilzied the defender; and the Court adhered.

The Judges were of opinion that, in the circumstances of this case, and more especially seeing that the pursuer had dispensed with the proof being taken down ad longum, and having suffered the report to be made without objection, he was not now entitled to insist on being heard before the Lord Ordinary, and which he, by his own act, had rendered impracticable.

*Pursuer's Authorities.* — 2. Dow, 106. — *Glenzie*, Feb. 24. 1825, (ante, Vol. III. No. 388.)

J. CHRISTIE, — A. HUTCHISON, — Agents.

No. 303. MRS. TEMPLAR and Lady MONTGOMERY, Pursuers. — *Baird* — *H. J. Robertson*.

GRAHAM'S TRUSTEES, Defenders. — *D. of F. Cranstoun* — *Green-shields*.

*Trust—Succession.* — Circumstances in which a conveyance of lands to trustees for behoof of a contingent heir, held to carry the rents of the lands for behoof of such heir, when he should exist, during the period while there was no heir entitled to demand of the trustees to denude.

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B.

THE late Mr. Graham held the estate of Kinross under a destination to heirs-male, and was proprietor, by purchase, of the lands of Burleigh, and other properties. He died in 1819, leaving two daughters, Anna Maria (Mrs. Templar) and Helen (Lady Montgomery). While in India, some years before his death, he executed a settlement, whereby he conveyed to certain persons, as trustees, 'All messuages, lands, tenements, or heritages, of what-ever denomination, belonging or which shall belong to me at the time of my death, or which I am now seized of, or in any manner entitled unto, in possession, reversion, or remainder, with the whole of the writings, muniments, title-deeds, and evidences thereof, or belonging or appertaining, or relating in any manner thereto; as also all wadsets, tacks, decreets of adjudication, and all India stock, debts heritable, and all other debts owing to me at the time of my death, by bond or otherwise, plate, jewels, &c. for these purposes:—1. To pay a yearly annuity to his wife, 'issuable and payable out of my foresaid real and landed estates.'—2. 'To apply annually from time to time, and as my said trustees, or the survivor of them, or the heirs and assigns of such persons



‘vivor of them, shall receive the same, the annual rents or profits of all my aforesaid real or landed estates to the payment of the sum of £5000 to my daughter Helen.’—3. ‘To denude themselves of, and convey all and every my aforesaid real or landed and heritable estates hereby conveyed, but charged and chargeable with the annuity to my said wife Ann as aforesaid, and the said sum of £5000 to my daughter Helen, in favour of, and unto and to the use of, the first son of my body lawfully to be begotten, and of the heirs-male of the body of such first son lawfully issuing; and for default of such issue, in favour of, and unto and to the use of the second, third, fourth, fifth, and all and every other the son and sons of my body lawfully to be begotten;’—‘and for default of such issue, then unto the first son of either of my said daughters lawfully begotten, who shall first attain the age of twenty-one years, his heirs and assigns for ever;’ in default of whom, to convey the estate of Kinross to his nephew George, and that of Burleigh to his nephew Robert, and to sell the residue of his real property, and pay the proceeds, along with the remainder of his personal effects, to his wife and two daughters. The deed also contained the following clause:—‘And I do hereby assign and dispoise to myself, and to my said trustees, for the use and behoof of my heirs and substitutes before mentioned, in the order aforesaid, all and sundry charters, procuratories and resignations, precepts of sasine, and other writs and securities of the lands and others before conveyed, and also the whole rents, feu-duties, mails, casualties, and profits thereto belonging, and tacks, if any be subsisting at the time, for now and in all time coming.’

Graham left no sons, and at the time of his death Mrs. Templar had an only daughter, and Lady Montgomery two sons, both in minority. On the death of Mrs. Graham, which happened soon after that of her husband, there remained no burden on the rents of the heritable property, as Lady Montgomery’s provision of £5000 had been previously paid; and she and her sister, conceiving that while there was no heir-male existing that had attained the age of 21, so as to be entitled to take up the heritable properties, the rents of the estates must be held to have been unappropriated by the truster, and therefore fell to them either in the character of heirs at law or residuary legatees, raised an action against the trustees, concluding to have their rights thereto declared. The Lord Ordinary decerned and declared in terms of the libel; but the Court, after having appointed intimation to be made to the children of the pursuers, or their legal administrators, altered his Lordship’s interlocutor, and annulled the trustees.

**LORD GLENZIE.**—If there were no declaration in the trust-deed, as to the person for whose behoof the trustees were to hold the estates during the intervening period, before the existence of an heir who could call on them to denude, the rents would not go as accessories, as we could not superinduce an intention not expressed in the deed. But it is quite different where there are words implying an intention on the part of the granter, that the rents should go to the person who ultimately gets the estate. The deed contains a plain declaration that the whole rents, feu-duties, &c. were to be held by the trustees for behoof of the heirs and substitutes in their order; and effect may be given to a trust for behoof of certain heirs, although the precise person may not for some time be ascertained.

**LORD PITMILLY** concurred.—The pursuers' claim must be founded on the idea that the rents were not appropriated; but they were undoubtedly conveyed to the trustees, and the pursuers therefore cannot demand them as heirs at law; consequently their only claim must be in the character of residuary legatees under the trust-deed. These rents are, however, conveyed for behoof of the heir who should be entitled to take up the estate; and although it is a matter of contingency who should be the heir, that cannot affect the amount of the estate to be taken up by him.

**LORD JUSTICE-CLERK** was of the same opinion.

**LORD ALLOWAY.**—I agree with the opinions already delivered, but I go further, and hold that when an estate is conveyed for behoof of another, the rents are carried as accessories, and go to the person for whose beneficial interest the estate is conveyed, unless there be a provision to the contrary. Besides, the pursuers were not the heirs *alioqui successuri* of the granter in the estate of Kinross; and their claim to the remainder as residuary legatees could not emerge till the failure of the granter's two nephews.

*Pursuers' Authorities.*—Souter, Jan. 22. 1801, (F. C.); Hyslop, Jan. 18. 1811, (F. C.); Arkwright, Dec. 3. 1819, (F. C.); Niven, March 6. 1822, (ante, Vol. II. No. 250).

*Defenders' Authorities.*—Gillespie, Dec. 7. 1802, (F. C.); Speed, Jan. 10. 1805, (subjoined to Reid, March 10. 1809, F. C.); E. of Stair, Feb. 12. 1823, (ante, Vol. II. No. 187).

R. STUART,—J. CAMPBELL jun. W. S.—Agents.

No. 304.

T. SCOTT, Suspender.—*Rutherford*.

P. SHAW, Charger.

*Suspension before Extract.*—Bill of suspension of a decree for a sum below £12 allowed before extract.

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Bill-Chamber.

Lord Medwyn.

**LORD MEDWYN** reported a bill of suspension as of a threatened charge on a decree of an Inferior Court, not extracted; for a sum under £12, and pointed out two decisions of the First Divi-

sion, where such bills had been held competent, viz. Gellatly, 15th June 1824, and Swan, 17th May 1825.\* The Court instructed his Lordship to receive the bill as competent.

**LORD JUSTICE-CLERK.**—Although there is considerable doubt as to the principle being correct, yet, in a matter of form like the present, it is advisable not to depart from the decisions already pronounced on this point.

The other Judges concurred.

*Suspender's Authorities.*—Gellatly, June 15. 1824, (ante, Vol. III. No. 101); Swan, May 17. 1825, (ante, Vol. IV. No. 10.)

G. SCOTT,—

—Agents.

J. HAMILTON, Pursuer.—*Jeffrey—Shaw.*

No. 305.

J. HAMILTON and Others, Defendants.—*Moncreiff—Skene—Gillies.*

*Compound Interest—Usury.*—Circumstances in which a bond granted for the amount of a debt made up, after the lapse of fourteen years, on the principle of compound interest, was sustained.

By a deed of settlement in 1801, the late William Hamilton conveyed his lands of East Quarter to his eldest son John, under burden of certain provisions, and particularly of the payment of £500 to each of his six sons, payable at the first term of Whitsunday or Martinmas after the expiration of a year from his death; and further, that he should either keep the sons who were unmarried in family as became their station, or allow them the interest of their provisions from the period of their leaving the family. The father died in the course of the same year, and the provisions became payable at Martinmas 1802. At this time all the sons, with the exception of the two youngest, resided in America; and these two, after remaining for some years in the family, also went to America. In 1815, an action was brought by these two younger sons against John for payment of their provisions, in which Lord Alloway decerned against him, 'with interest thereof, from Martinmas 1802; and with regard to the interest from Martinmas 1801 to Martinmas 1802, appointed the pursuers to state whether they lived in family with their father at the period of his death.'—No further procedure occurred in this action.

Although John had occasionally made advances on account of his brothers, no settlement had hitherto taken place between them

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\* But see *Alexander v. Byrne*, ante, Vol. III. No. 136.

as to their provisions. In the month of August 1815, a state of debt was made up between them, from Martinmas 1802 to Martinmas 1816, on this principle;—John was charged with the whole provisions due by him at Martinmas 1802, and to this was added the interest for the following year;—on this accumulated sum interest was again charged, and this operation was continued down to Martinmas 1816, when a balance was struck, after giving credit, at their respective dates, for the intermediate advances made by John. For the balance so ascertained, John granted an heritable bond, and bound himself to pay the interest thereon annually. No deduction had been made of the property-tax; and having thereafter granted a second heritable bond over the same lands for a debt due to the pursuer, John assigned to him, in further security, the right to demand payment of the property-tax, and gave him power to impugn the first bond on any ground legally competent. The pursuer accordingly raised an action of reduction of that bond, on the ground,—1. That as no settlement had been made between the parties for a period of fourteen years, and as the balance due by John was brought out by accumulating interest upon interest during that period, and as the bond had been granted as a security for that balance, compound interest had been thus exacted, and more than 5 per cent. annually had been obtained, and therefore the bond was objectionable both at common law, and on the statute of Queen Anne;—and, 2. That, independently, it was liable to reduction in terms of the statutes relative to the property-tax, seeing that no allowance had been made on that account; and it was offered to be proved, that the defenders had refused to deduct it. To this it was answered,—1. That the arrangement under which the bond had been granted, was the result of a transaction by which the process and the claim for expenses at the instance of the two younger brothers had been abandoned, and therefore it was not liable to be set aside;—2. That the statute of Queen Anne could not apply, because it had reference to a prospective stipulation for more than 5 per cent. per annum, whereas there was no such stipulation in this case, and no more than 5 per cent. had been taken in any one year; that neither was the bond objectionable at common law, because, as it was the duty of the elder brother to have paid the interest annually, he had merely done justice by allowing the account to be stated on the above principle, and that accordingly the Court had, in similar cases, sanctioned such a mode of accounting;—and, 3. That the statutes relative to the property-tax did not apply to an arrangement of this nature, but to deeds stipulating for the non-payment of it. Lord Eldon assuaged the defenders' gene-

rally; but Lord Medwyn, on advising a representation, altered, and found ' that the bond and disposition in security granted by ' John Hamilton of East Quarter, on 30th August 1815, is expressly said to be for the balance of the provisions still due to ' the granter's four brothers; and, by a state dated 15th August ' 1815, it appears that, in bringing out said balance, interest has ' been annually added to the sum due, and interest on the accumulated sum charged, although it is not alleged that any ' intermediate settlement of the accounts had taken place; that ' no action can be sustained upon this bond, in respect the same ' has in this manner been made up in part of undue exactions,' and therefore reduced and decerned in terms of the libel; but reserved the defenders' claims against their elder brother. To this interlocutor his Lordship adhered on considering a representation for the defenders, and issued the following note:— ' The Lord Ordinary kept in view the judgment of the Court in ' Colquhoun v. Dunn, 12th February 1790, in pronouncing the ' interlocutor represented against. The only difference between the ' two cases is, that, in the one, interest was charged upon interest ' half yearly, and in the other only annually. But this does not ' seem to make any essential difference on the case. In both, ' interest upon interest is charged, which at common law is unlawful, (see Baron Hume, Vol. I. p. 498, referring to M'Kenzie, ' Stair, and Bankton); and in both, more than ' £5 for the forbearance of £100 for a year,' and after that rate for a longer ' time has been received, which makes it void by the statute of ' Queen Anne, (see the statement made by Lord Thurlow as to ' the law of England on the subject of compound interest, quoted ' in Comyn on Usury, p. 148, note.) It is presumed that the ' statutes of usury must be enforced till they are repealed, and ' more especially in a case where there is no question about penalties.'—The defenders having reclaimed, and confined themselves to the objection relative to the undue exactions, the Court altered, and assoilzied them in toto from the reductive conclusions, but found the pursuer entitled to deduction of the property-tax, and subjected him in expenses.

**LORD HERMAND.**—This is a mere civil question, there being no conclusion in the summons for penalties. The statute of Queen Anne applies wherever more than 5 per cent. has been taken, which is the case here. Besides, the bond is objectionable at common law. No doubt, when the interest falls due, the parties may agree to hold it as so much stock; but there has been no such agreement. On the contrary, there has been an accumulation of interest for

fourteen years, which is clearly unlawful. It is said that the Court has in some cases allowed accumulation of interest, but it certainly has never done so in any one of this description. I am therefore for adhering to the interlocutor.

**LORD CRANKE.**—I view this case in a different light. The elder brother, who was residing in this country, had delayed for upwards of 14 years to make any payments, in terms of his obligation, to his younger brothers, who were residing in America, where 6 per cent. is allowed. Then an action was brought in this Court, in which they merely asked for simple interest. That action, however, was compromised; and while they agreed to give up their claim for expenses, he consented to give compound interest, so that this must be viewed as an amicable settlement. This bond was accordingly taken for the principal and interest, and I am of opinion that it was not an illegal transaction, and therefore that the interlocutor ought to be altered.

**LORD GILLIES.**—It is impossible to bring this case within the statute of Queen Anne, so that the question is, whether there has been any exorbitancy from which the pursuer is entitled to be relieved? The elder brother was bound to pay his younger brothers their provisions; and as they were residing in America, and no such payments were made, it was his duty to have debited himself with the interest annually. Then there was a transaction in which he agreed that the account should be made up on that footing; and so far from there having been any thing illegal in such a transaction, I think it was just the mode in which such a settlement should have been made, and therefore that the interlocutor should be altered.

**LORE PRESIDENT and BALGRAY** were of the same opinion.

*Pursuer's Authorities.*—4. Cod. de Us. tit. 32; 22. Voet. l. 20; Mack. Tit. Usury, No. 5; L. Braid, Jan. 26. 1669, (16411); L. Bank. 21. 14; 1594, c. 22; Stair, 139; 1. Hume, 498; Dann, Feb. 12. 1798, (16436); 2. Camp. Rep. 498; 1587, c. 82; Comyn, 148.

*Defenders' Authorities.*—Hall, Nov. 22. 1813, (F. C.); Hamilton, Feb. 25. 1813, (F. C.); Comyn, 146. 187; 2. Anst. 495.

**C. FISHER, — CAMPBELL and CLASON, W. S. — Agents.**

Sir H. MUNRO, Pursuer.—*D. of F. Cranstown—Moncreiff.*  
 G. MUNRO and Others, Defenders.—*Thomson—Fullerton—  
 Matheson.*

*Entail*.—Held,—1.—That the omission of the words ‘for new investment’ in an entail made in form of a bond and procuratory of resignation is not fatal to it, the deed being otherwise sufficiently expressed.—2.—That a declaration that debts and deeds shall be null and void, so far as they affect the estate, is sufficient without declaring that they shall be null and void as against the contravener; and,—3.—That a declaration, that in case an heir-substitute succeed to another estate requiring the assumption of a name and title inconsistent with those provided by the entail, he shall convey the entailed property to the next heir, subject to the fetters, does not free an heir not taking under such conveyance, but under the entail—the fetters being held, on a sound construction, to apply to the heirs universally.

THE late Sir Harry Munro, proprietor of the estate of Foulis, executed a deed of entail in the form of a bond of tailzie and procuratory of resignation, by which he bound and obliged himself and his heirs whatsoever ‘to make due and lawful resignation of all and sundry my lands, &c. in the hands of my immediate lawful superiors of the same, to be made, given, and granted to myself; whom failing, to the said Hugh Munro, my eldest lawful son, and the heirs of his body;’ whom failing, a series of substitutes; ‘but with and under the reservations, conditions, provisions, restrictions, limitations, clauses irritant and resolute, powers, faculties, and declarations after mentioned, and no otherways.’ He then appointed his procurators for me, and in my name and behoof, duly and lawfully to resign and surrender, upgive, overgive, and deliver, likeas I by these presents, with and under the reservations, conditions, provisions, limitations, restrictions, clauses irritant and resolute, powers, faculties, and declarations after mentioned, resign, surrender, upgive, overgive, and deliver all and sundry the lands after mentioned, &c. in the hands of my immediate lawful superiors of the same, or of their commissioners in their names, having power to receive resignations, and to grant new investments, to be made and granted to me the said Sir Harry Munro myself, whom failing, to Hugh Munro, my eldest lawful son, and the heirs-male of his body;’ whom failing, the series of substitutes contained in the former part of the deed. It was then declared, that this should be granted ‘with and under the several conditions, provisions, restrictions, limitations, clauses irritant and resolute, powers, faculties, and declarations after written, and no otherways, viz. with this condition always, as it is hereby expressly provided and declared, that the whole heirs of tailzie and

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‘ substitutes, both male and female, particularly and generally  
‘ above mentioned, and as well general as of tailzie, and the de-  
‘ scendants of their bodies so succeeding, and enjoying the said  
‘ lands and estate, shall be obliged, in all time from and after  
‘ their succession to the said lands, barony, and others above  
‘ mentioned, and also the husbands of the heirs-female so succeed-  
‘ ing and enjoying the said estate, to assume, use, and bear and  
‘ constantly retain the surname, arms, and designation of Munro  
‘ of Foulis; and declaring, as it is hereby expressly provided and  
‘ declared, that in case any of the heirs and substitutes above  
‘ mentioned, succeeding as above, whether heirs-general or of  
‘ tailzie, shall happen to succeed to any other title or dignity,  
‘ whereby the surname, arms, and designation of Munro of Foulis  
‘ might be totally sopited, or succeed to any other tailzied estate,  
‘ whereby they may be disabled from carrying the said arms,  
‘ name, and designation of Munro of Foulis, that then and in  
‘ such case the heir so succeeding to such title, or accepting of  
‘ such tailzied estate, shall be bound and obliged respectively,  
‘ and from time to time, in all time coming, to denude and divest  
‘ himself or herself of the aforesaid lands, barony, teinds, and  
‘ others above disposed, in favours of the next heir of tailzie for  
‘ the time, to whom the said lands and others above mentioned  
‘ are hereby declared to pertain and belong; but with and under  
‘ the reservations, conditions, provisions, restrictions, limitations,  
‘ clauses irritant and resolute, powers, faculties, and declara-  
‘ tions contained in this present right,’ &c.; ‘ and with and under  
‘ this limitation and provision, as it is hereby expressly provided  
‘ and declared, that the lands, &c. above designed shall not be  
‘ affected nor burdened with, nor subject nor liable to be appraised,  
‘ adjudged, or anyways attached, burdened, or evicted for or by  
‘ the debts or deeds of any of the heirs aforesaid or substitutes,  
‘ whether general or of tailzie and provision, male or female, be-  
‘ fore mentioned, who shall succeed to the same, due or granted  
‘ prior to such succession, or by any debts or deeds which may  
‘ be contracted after such succession, as after expressed.’ There  
is then a prohibition against altering the order of succession, sell-  
ing or burdening the lands, or doing any other act whereby the  
deed of tailzie might be affected; and that ‘ with and under the  
‘ irritancy following, that in case any of the heirs-general or of  
‘ tailzie particularly and generally before mentioned, or the hus-  
‘ bands of the heirs-female, shall contravene the foresaid condi-  
‘ tions, provisions, restrictions and limitations, and others before  
‘ expressed and herein contained, or any of them,—that is, shall  
‘ fail or neglect to obey or perform the said conditions and provi-



'sions, and each of them, or shall act in the contrary of the said restrictions or limitations, or any of them, that then, or in any of these cases, not only all such acts, facts, deeds, and debts contracted, done, or committed contrary thereto, or to the true intent and meaning thereof, with all that may follow thereon, shall be in themselves void and null, and of no avail, force, strength, or effect against the other heirs of tailzie, and the said lands, &c. above mentioned, (which, or no part thereof, shall not be anyways burdened therewith,) in the same manner as if such debts, deeds, omissions, or commissions had not been contracted, done, or granted, or had never happened; but also the person or persons so contravening, by failing to obey the said conditions, or acting contrary to the said limitations, or any of them, as aforesaid, shall, for himself or herself allenarly, ipso facto amit, lose, and forfeit all right, title, or interest which he or she have, hath, to or in the said tailzied lands and estate, and the same shall become void and extinct; and the said tailzied lands and estate shall devolve, accrese, and belong to the next heir of tailzie appointed to succeed, albeit descended of the contravener's own body, and in the same manner as if the contravener was naturally dead.'

Sir Harry Munro having died in 1791, the pursuer, his eldest son, served heir of tailzie to him on the 18th of May of that year; and having executed the procuratory, he obtained a Crown charter in terms of that deed, in virtue of which he was infeft, and thenceforward possessed the estate. Recently, however, conceiving that he had discovered certain objections to the entail, he brought an action of declarator, to have it found that he was the unlimited proprietor of the lands, and that he was not subject to the fetters of the entail,—1. Because, as these fetters were inserted only in a procuratory of resignation, and were merely the conditions upon which the resignation was authorized to be made to the superior; and as the procuratory and the obligation to resign only declared that the resignation was to be made alternatively 'in the hands of my immediate lawful superiors of the same,' or, in their absence, in those of 'their commissioners having power to receive resignations, and to grant new infeftments,' but did not express for what purpose the resignation was to be made, and particularly did not state that it was 'in order that new infeftment' under these fetters should be given to the granter, and other persons therein mentioned, such a resignation could not warrant a new infeftment under the restrictions of the entail.—2. Because, although it was declared by the irritant clause that all acts, facts, deeds, and debts contracted or committed contrary to the

terms of the entail were to be in themselves void and null, yet there was no declaration that they should be so as against the contravener, which it was essential there should be, according to the statute 1685, c. 22.—3. Because, although it was declared that the heirs and substitutes succeeding to any other title or estate, whereby the surname, arms, and designation of Munro of Foulis might be totally sopited, should grant conveyances to the next substitute in the order of the entail, and that in these conveyances there should be inserted all the fetters of the entail, yet these fetters were not declared to affect the right either of the pursuer or any of the other heirs who should not so happen to succeed to any such title or estate. To this it was answered,—1. That the introduction of the words ‘for new infeftment’ was not necessary, and, at all events, the deed was sufficiently expressed, seeing that the condition of the resignation was ‘to give and grant the lands’ in favour of Sir Harry and the heirs substitute, subject to the fetters of the entail, which was synonymous with the expression ‘to give and grant infeftment of the lands’ under these conditions, and that the omission (if there had been such) was a mere clerical error;—that accordingly the pursuer had experienced no difficulty in obtaining a new infeftment in virtue of the procuratory, and that he was not entitled, after having been so infeft, to set aside his title of possession in an action of declarator.—2. That as the irritant clause declared all acts of contravention to be in themselves null and void, and of no effect against the estate, and there were no words which could limit their application, the clause was in every respect complete.—3. That the limitations were clearly directed against every heir and substitute; that throughout the whole deed it was declared that they should take subject to the fetters; that an incapacity was created in the event of any of them succeeding to a title or estate incompatible with the name and designation of Munro of Foulis, in which case they were to convey under the fetters to the next heir not so incapacitated, but that these fetters were not limited to that class of heirs.—Lord Alloway appointed the case to be stated to him in memorials, and observed in a note, that ‘it is chiefly upon the third ground of declarator that the Lord Ordinary finds difficulty;’ and Lord Eldin, on advising these memorials, decerned and declared in terms of the libel. But the Court altered, and absolved the defenders.

**LORD BALGONY.**—I have repeatedly perused the deed of entail, and I am satisfied that it is as effectual as any one that was ever made. The procuratory of resignation is quite distinct; and unless it had

been expressly stated to have been ad remanentiam, the superior was bound to return the lands to the party and his heirs, under the conditions on which it was made. With regard to the objection to the irritant clause, it is equally unfounded. The acts are declared to be null and void, which is in terms of the statute. No verba solemnia are required. The meaning of the statute is, that these acts and deeds shall be null and void, so far as affects the estate. It is absurd to say that they are void and null in themselves, without reference to the estate. In regard to the other objection, it is plain that the condition of the deed is, that, in the event of an heir being incapacitated by being unable to assume the name and designation of the estate of Munro of Foulis, the estate is to devolve on the next succeeding heir, and the heir so incapacitated is to make the conveyance subject to all the fetters of the entail. They are not confined, however, to the class of heirs so succeeding, but apply universally.

The other Judges concurred.

*Purser's Authorities.*—3. Ersk. 3. 29; 2. Bank. 149; Bell's Cases, 188; Dalziel, May 30. 1809, (T. C.); Mowat, Feb. 6. 1823, (ante, Vol. II. No. 170); Barclay, Feb. 8. 1831, and May 18. 1831, (1. Shaw, Ap. Cases, No. 6); Hope's Min. Pr. 404. 407; 2. Mack. 8. 3.

*Defender's Authorities.*—Syme, Feb. 27. 1799, (15473, and No. 5. Ap. Tailzie); Steel, May 12. 1814, (T. C.); Douglas, Nov. 14. 1823, (ante, Vol. III. No. 476.)

J. FORMAN, W. S.—T. MACKENZIE, W. S.—Agents.

G. CAMPBELL, Suspender.—A. McNeill.

No. 307.

J. ANDERSON, Charger.—*Forsyth*—*Sandford*.

*Summary Warrant—Master and Servant.*—Held incompetent, after the expiration of a written agreement of service, to compel a workman, by summary imprisonment, to work for a certain number of days, on an allegation that he had been absent for a corresponding time during the currency of the agreement.

On the 5th of November 1823, George Campbell entered into an agreement to serve Anderson as a loam-moulder by a letter in these terms:—‘5th November 1823.—I hereby agree and become bound to serve you for one year for 25s. weekly wages, and £6 at the year's end in name of house-rent; and I promise to conduct myself faithfully, diligently, and honestly, and to promote your interest to the utmost of my power, as loam, dry-sand, or green sand moulder.’ The period of engagement expired on the 5th of November 1824, and on the 2d December thereafter Anderson presented a summary petition to the Sheriff of Edinburgh, stating that, during the currency of the engage-

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\* This case was decided on the 31 December 1825.

ment, Campbell had been absent from his service for 78 days, as appeared from a time-book kept in his warehouse:—that, according to a rule of the trade, he was bound to make up for the lost time by working for a corresponding number of days at the expiration of the agreement:—that he had in part done so, but that on the preceding day he had deserted his service. He therefore prayed for a warrant to imprison Campbell, till he should find caution to work for the period during which he had been absent. A warrant to apprehend him, and bring him for examination, was granted; and, after he had emitted a judicial declaration, the Sheriff granted warrant to incarcerate him in the tolbooth of Edinburgh, ‘until he find sufficient caution, acted in the Sheriff Court books of Edinburgh, to return to the petitioner’s service, and to serve him six weeks in terms of his agreement, and that under the penalty of £20 sterling.’ Campbell, having been immediately imprisoned, presented a bill of suspension and liberation, which was passed; and in support of it he contended that the warrant was unlawful,—1. Because, as the period of agreement had expired, and as the allegation of Anderson merely was that it had not been duly implemented, and that he was entitled to reparation, his claim truly resolved into one of damages:—that his wages had been withheld for the time that he was actually absent, so that no injury had been suffered, and, at all events, it was incompetent to compel him to give reparation in a summary form.—2. Because, as it was denied that he had been absent during the alleged number of days, and no proof had been taken, the Sheriff was not entitled to ordain him to be imprisoned till he should find caution, under a penalty, to work for six weeks; and, 3. Because this case was distinguished from that of *Reid v. Raeburn* by the circumstance, that there was a written agreement, and that the term of it had expired; whereas, in that case, the period of service was current, and the agreement had been made in reference to an understood practice, of which evidence had been adduced. To this it was answered, that Campbell was perfectly aware that he was bound to work for the number of days during which he had been absent:—that accordingly he had in part performed this obligation, and thereby admitted that he was bound to do so:—that the number of days was distinctly entered in the time-book, and that it was confirmed by Campbell’s judicial declaration, and therefore the service must be held to be current; and consequently the Sheriff was entitled to issue a summary warrant of imprisonment, in order to compel performance. The Lord Ordinary suspended the letters simpliciter, found Anderson liable in expenses, and the Court adhered.

Their Lordships were of opinion that this case was clearly distinguishable from that of *Reid v. Raeburn*, as the period of service had expired.

*Chorger's Authority*.—*Raeburn*, June 4, 1824, (ante, Vol. III. No. 73.)

T. BAILLIE,—D. FISHER,—Agents.

C. GREENHILL, Pursuer.—*Moncreiff—Miller—Neaves*.

No. 308.

Mrs. C. AITKEN or FORD and Others, Defenders.—*D. of F. Cranstoun—Greenshields*.

*Bona Fides—Title to Pursue*.—The trustee on the sequestrated estate of a divorced husband, who, by contract of marriage, had right to the liferent of his wife's acquirenda, having, subsequent to the date of the decree of divorce, raised an action of reduction, ex capite lecti, of a settlement of his wife's uncle which excluded his jus mariti—Held that the settlement, while unreduced, was a good title of possession, and that the wife was in bona fide to consume the fruits; and that such being the case, he had no interest to pursue the reduction, the liferent having fallen by the divorce.

By contract of marriage between Mrs. Catherine Aitken and Ford (on whose sequestrated estate Greenhill was trustee,) the latter was entitled to the liferent of all the property which his wife might acquire during the marriage. In the year 1816, Mrs. Ford's uncle, Mr. Aitken of North Tarry, while on deathbed, executed a deed of settlement, leaving all his property to trustees, to be divided between her and her sister Mrs. Mudie, to the exclusion of another sister Mrs. Moir, and so far as regarded Mrs. Ford's share, excluding the jus mariti of her husband. This deed was, immediately on Mr. Aitken's death, challenged by Mrs. Moir ex capite lecti, and was finally reduced by a judgment of this Court in 1821, affirmed on appeal in 1824. In 1820, sentence of divorce was pronounced against Ford in an action at his wife's instance, and from that period his liferent interest in her acquirenda fell, (see ante, Vol. III. No. 121.) In 1823, however, Greenhill, the trustee on his sequestrated estate, raised the present action against Mrs. Ford, and the trustees under Mr. Aitken's settlement, concluding to have the deed reduced ex capite lecti, to the effect that he, as in right of Ford, might draw the liferent interest of the share of the property to which Mrs. Ford had right as heir-portioner, unfettered by the exclusion of his jus mariti, from the death of Mr. Aitken till the date of the divorce. It was pleaded in defence, 1. That as the deed of settlement gave more to Mrs. Ford than she would otherwise have been entitled to, it was not to her prejudice, and her husband therefore had no title

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to reduce, merely because it excluded his *jus mariti*; and, 2. That he had no interest to insist, because, till reduced, it was a good title of possession, during which the fruits were bona fide consumpti, and Ford's interest came to an end by the divorce in 1820, before the deed was reduced, or even challenged on his part. The Lord Ordinary, 'in respect it appears that the pursuer has no interest to insist in this action of reduction,' assailed the defenders, and the Court unanimously adhered.

**LORD ALLOWAY.**—There can be no doubt as to this case, on the ground stated by the Lord Ordinary in his interlocutor. I do not go into the general question of a husband's title to reduce a deed in circumstances like the present. If it had occurred before the divorce, a very different question might have arisen. But the only matter before the Court is that of interest to insist; and there can be no room to doubt that the deathbed deed, till cut down, was a good title of possession and intromission, and consequently that Ford, whose right was merely liferent, and ceased in 1820, can have no interest to pursue this reduction.

The other Judges concurred.

**Pursuer's Authorities.**—(1.)—2. *Ersk.* 8. 100; 1. *Bell*, 653; *Creditors of Balmuccia*, Feb. 16. 1669, (16421.)—(2.)—2. *Ersk.* 1. 23.

**Defenders' Authorities.**—(2.) *Bonny*, July 30. 1760, (1728); *Leslie Grant*, Feb. 8. 1765, (1760); *Lawrie*, June 21. 1769, (1764); *Bowman*, June 11. 1805, (F. C.); *Turner*, March 2. 1820, (F. C.); *Duke of Buccleuch*, Nov. 13. 1821, (*ante*, Vol. II. No. 5.)

**T. DEUCHAR, — R. RATTRAY, W. S. — Agents.**

**No. 309. Mrs. C. AITKEN or FORD, Complainer. — *D. of F. Cranston-Greenshields.***

**C. GREENHILL, Respondent. — *Montcreiff — Miller — Neaves.***

**Sequestration — Bankrupt.**—A wife entitled to payment of a dividend out of her divorced husband's sequestrated estate for provisions in her contract of marriage, on granting such deeds as should be necessary to enable the trustee to recover a share, to which her husband had been found entitled, of certain funds in Chancery to which she had succeeded.

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**Mrs. CATHERINE AITKEN** having claimed to be ranked and receive a dividend out of the sequestrated estate of her husband Ford, for certain provisions due her under their marriage contract, Greenhill, the trustee, sustained the claim, but refused to make payment of any dividends until he should receive from her payment of the share found due to Ford (*ante*, Vol. III. p. 121.) out of the funds to which she had succeeded by the death of her uncles in the West Indies, which funds had been thrown into

Chancery, to determine certain claims on the part of the different persons having interest. Of this judgment Mrs. Ford complained to the Court. The Lord Ordinary altered the judgment, and ordained the trustees 'to pay the dividend declared to be due the complainer on her claim;' and the Court adhered, under condition that she should execute any deed in favour of the trustees which should be necessary to enable him to recover Ford's share of the funds in Chancery.

R. RATTRAY, W. S.—T. DEUCHAR, —Agents.

W. and J. WATSON and Co. Pursuers.—*Moncreiff—Ivory.*  
O'REILLY, HILL, MAY, and Co. Defenders.—*Skene—Brown.*

No. 310.

*Implied Guarantee—Principal and Agent.*—Held, in a question as to an implied guarantee of sales of goods consigned by a Glasgow merchant to agents in Jamaica, that a letter by the agents, declining to guarantee, sent by the first mail-packet, was an answer in course, although two private ships authorized to carry letters had sailed to Britain in the mean while.

ON the 10th of August 1810, the pursuers, merchants in Glasgow, dispatched a letter, accompanying a consignment of goods, to the defenders, mercantile agents in Jamaica, stating that 'we shall want no advances on what goods we ship to you; we therefore expect that you will charge us no more than 5 per cent. for selling and guaranteeing, and 2½ for remittance, which is the highest we have paid,' &c. This letter was received by the defenders on the 23d of October, and on the 24th of November they wrote an answer, declining to guarantee, as it was not their general practice to do so; but stating that they would place the pursuers, with respect to commission, on a footing equally as favourable as their other correspondents. In the interval between the receipt of the pursuers' letter and the answer by the defenders, two ships, the John and Jane, had sailed from Jamaica, by which letters were brought to this country under the permission of the 39. Geo. III. c. 6, authorizing the masters of private ships to carry letters, and to deliver them, on their arrival, at the nearest post-office. These ships, however, did not carry the mail-bags, nor were the letters which they brought put into the post-office at Jamaica, but were received from the merchants either privately, or by being transmitted to the shipmasters. The defenders sent letters to other correspondents by these ships, but dispatched their answer to the pursuers by the Government packet on the 25th of November, and which was the first that had sailed since the receipt of the letter.

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A great loss having been sustained on the consignment, the pursuers brought an action against the defenders, on the ground, inter alia, that as no answer had been returned to their letter by the two private ships, and as the consignment had been made on condition of the sales being guaranteed, the defenders must be held to have accepted of the consignment on that condition. In defence it was pleaded, that as they had returned an answer declining to guarantee, by the first mail-packet, this was an answer in due course, and therefore they could not be bound to guarantee the sales. Lord Alloway found that the defenders must be held to have acquiesced in the condition on which the consignment was made, 'in respect it was the duty of the Jamaica house ' to return an answer by the very first ship, and they might have ' written by the John, which it is admitted they did not do; and ' the pursuers were entitled to expect, independent of the express ' demand in their letter, which was not answered in course, that ' the guarantee commission should be as low as the commission ' for which the Jamaica house undertook that guarantee to ' others.' The defenders having reclaimed, the Court, after causing an investigation to be made as to ' whether the two merchant ' vessels called the John and the Jane, or either of them, carried ' regular mail-bags on their voyage from Jamaica in the month ' of October 1810, and also at what period the first regular packet ' vessel left the island of Jamaica subsequent to the 23d day of ' the said month of October, and at what time the said packet ' vessel arrived in Britain,' remitted to the Lord Ordinary to reconsider the case. His Lordship then recalled his interlocutors, in respect ' it is now instructed that the defenders did answer the ' letter by the very first packet that sailed from Jamaica after the ' receipt of that letter, by which they refused to guarantee the ' sales;' and to this interlocutor Lord Eldin, and thereafter the Court, unanimously adhered.

Their Lordships held, that an answer by the first mail-packet was one in regular course, and that the defenders were not bound to send an answer by private ships, even although those ships were permitted to carry letters, unless they had also brought the mail-bags, and as such were to be regarded as Government packets.

CAMPBELL and MACDOWALL,—J. CRAWFORD, W. S.—Agents.



E. PATERSON, Pursuer.—*Jameson—Graham Bell.*  
D. COWAN, Defender.—*D. of F. Cranstoun—Rutherford.*

No. 311.

*Arrestment.*—1.—Execution of loosing of arrestments, under a general will in letters obtained for the purpose of loosing prior arrestments in the hands of another party, held sufficient warrant to authorize the arrestee to pay to the common debtor.—2.—Prescription of arrestment on a dependence runs from the date of the decree, and not of a judgment finding letters orderly proceeded in a subsequent suspension.

IN December 1813, Eccles, a creditor of Grainger, used arrestments, by virtue of signet letters, on the dependence of an action before the Sheriff Court of Dumfries, in the hands of Pitcairn, proprietor of the general rag-warehouse in Edinburgh, and of Jack, his keeper or clerk, who were indebted to Grainger. Paterson, the pursuer, on the 7th February 1814, along with two other persons, having enacted themselves cautioners to make the goods, gear, &c. arrested forthcoming, Grainger obtained letters of loosing, the will of which directed the messengers to 'loose the foresaid arrestments used at the instance of the said James Eccles in the hands of the said Archibald Jack; and how oft any such arrestment shall be used at the instance of the said James Eccles upon any goods, gear, &c. belonging to the complainer, that ye as oft loose and take off the same, and that ye intimate the loosing of the said arrestment to the said James Eccles, arrester, and deliver to him a schedule subscribed by you, containing the date of loosing the said arrestment, the names and designations of the witnesses there present, and of the cautioners therein: According to justice, because Edward Paterson, &c. hath become cautioner for the complainer to the effect above mentioned,' &c. In virtue of these letters, the arrestments were loosed on 26th February 1814. In the course of the following year, Cowan having become proprietor of the rag-warehouse, Eccles used two further arrestments, on the same signet letters, whereby he attached two additional sums of £58 and £79 due by Cowan to Grainger. Of these arrestments, loosings were immediately executed under the authority of the letters already obtained on Paterson's caution, and Cowan paid up to Grainger the sums arrested in his hands. Shortly after this, Eccles obtained and extracted a decree in the Sheriff Court against Grainger, who thereupon brought a suspension, in which Paterson became cautioner, and in 1821 the letters were finally found orderly proceeded. Grainger being insolvent, Paterson was obliged to pay the debt; but he obtained from Eccles an assignation to it and the diligence, containing a special con-

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veyance to the arrestments in the hands of Cowan; and in 1823 he raised against him this action, concluding to have him ordained to make forthcoming the two sums arrested in his hands. Besides the special grounds of defence arising from Paterson being the cautioner in the suspension, Cowan pleaded,—1. That he was in bona fide to pay the debt, on being served with a charge of loosing, which he contended was authorized by the will of the letters, which applied to all future arrestments;—and, 2. That the arrestments were prescribed by the lapse of five years from the date of the Sheriff's decree in the action, on the dependence of which they were used. It was answered,—1. That the messengers had no authority, under the letters of loosing, to loose any other than the first arrestment, for which alone caution had been found, and besides that no intimation had been made to the arrester;—and, 2. That prescription could only begin to run from the date of the judgment in the suspension finding the letters orderly proceeded, at which period alone the Sheriff's decree might have been operated upon. The Court, on the report of the Lord Ordinary, unanimously sustained the defences, and absolved.

**LORD GLENLEK.**—This question has arisen in consequence of the erroneous practice of continuing, subsequent to the act 1617, c. 17. the old form of letters of loosing. Prior to that act, while the messenger was to receive the caution, there was great propriety in empowering him to loose new arrestments, which he could do, on caution being found for each at loosing. But now, although caution is received in the Bill-Chamber only, and is limited to one arrestment, the power has, by some strange blunder, been continued to the messengers. It is intolerable that this practice should continue; but the letters of loosing here do contain a power to loose all subsequent arrestments; and it is impossible, therefore, to hold that the arrestee has paid *specto mandato* of the Court, on which ground alone decree could go against him. So far as he could judge from seeing the warrant and charge, he was entitled to think that the messengers had done nothing but what they were empowered to do. What puzzled me at first was this—that the will appoints the messenger to intimate to the arrester, and Cowan might have seen that there was no such intimation; but Erskine says that such intimation had gone into desuetude after the passing of the act 1617.

**LORD PRYMELEY** concurred, and observed that it would be necessary to correct this erroneous practice in framing letters of loosing by act of sederunt.

**LORD ALLOWAY** entertained the same opinion, and also considered it impossible to get over the plea of prescription.

LORD JUSTICE-CLERK agreed, and observed as to the plea of prescription, that a process of forthcoming might competently have been brought into Court after the Sheriff's decree was pronounced and extracted, notwithstanding the suspension, although decree could not have been obtained in it till the letters of suspension were finally discussed.

*Former's Authorities.*—Stair, 2. 12. 7. and 3. 1. 39. 40; Ersk. Pr. 342; A. S. June 3. 1685; 1690, c. 13.

*Defender's Authorities.*—(1.)—Ersk. B. 7. 17. and 3. 43; M. 6. 13. and W. 2. 21; —(2.)—S. Ersk. 3. 20.

JOHNSTON and LITTLE,—A. PEARSON, W. S.—Agents.

M. MURDOCH, Suspender.—*Monteith.*

MARY M'KIRDY and Others, Chargers.—*Shaw.*

No. 312.

*Executors, Cautioners for.*—Held that cautioners for executors are only liable to the extent of the sum confirmed, and that it be duly applied to the purposes of the executry, but not for any other sums intromitted with.

JANET M'KIRDY died intestate, leaving a number of relations in the same degree of kin, two of whom obtained a mandate from the others, authorizing them to apply for and obtain confirmation as executors qua nearest of kin. After a litigation with one who claimed right as the nearest relation of the deceased, in which these persons obtained decree, with expenses, they were decerned executors-dative, and on 2d January 1817 they were duly confirmed,—the sum of £170 being the amount of certain debts due the deceased, specified in the inventory given up by them. To the extent of this sum, the suspender Murdoch, along with two others, became cautioners that it should 'be made 'free and forthcoming to all parties having interest therein, as 'law will,' &c. The executors intromitted with sums considerably exceeding the debts confirmed, and amounting in all to £311. They made various payments to the next of kin; but these not exhausting the fund, Mary M'Kirdy, and others of the relations entitled to shares, raised an action before the Commissary of Glasgow, in which they called the cautioners; concluding that they should be answerable for the balance in the hands of the executors, to the extent of £170, the sum confirmed. In defence the cautioners pleaded, that they were only bound to see the sum confirmed applied to the purposes of the executry, and consequently that they were entitled to have credit given them for all sums paid by the executors to the next of kin, or in liquidation of the debts of the deceased, and for the expenses incurred by

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the executors in their management; and that they were only liable in the event of there being a balance of the £170, after deducting the amount of these sums, and the extent of that balance only. On the other hand, M'Kirdy &c. maintained that the cautioners were liable for any balance remaining in the hands of the executors, out of their whole intromissions, to the extent of £170, and at all events that they were not entitled to credit for any expenses incurred by the executors prior to confirmation. The sums for which deduction was claimed, were a single debt of the deceased for £5, the expenses of the litigation as to the office of executor, and a recompense for trouble on the part of the executors in getting the mandate in their favour signed by the several relations, who lived in different parts of the country. The Commissary remitted to an accountant to report on the accounts of the executors, and pronounced decree on the principles of one of the states brought out by him, which, after deducting from the whole funds intromitted with, the disbursements and the charges prior to confirmation, (modified to what he considered a reasonable amount,) left a balance exceeding the £170. The cautioners then brought a suspension, in which the Lord Ordinary, *inter alia*, found, 'that for payment of debts made after the confirmation, the cautioners are entitled to credit, and so far to extinguish their obligation, notwithstanding that there were funds in the hands of the executors more than the sum for which the suspenders became cautioners,' and that they accordingly were only liable for the balance of £170, over and above that sum. Against this interlocutor M'Kirdy &c. reclaimed; and, besides their pleas as to the general principle, they alleged that great part of the sum for which the Lord Ordinary had allowed credit, was for personal trouble and expenses prior to the confirmation, and they contended that these could not be admitted as articles of credit. The Court adhered to the interlocutor complained of, 'in so far as it fixes the principle, that the cautioners can only be liable to the extent of the sum specified in the bond of caution; found that they were entitled to deduction of such sums as have been paid by the executors, subsequent to the date of the confirmation, and which were lawfully chargeable by them against the estate, and remitted to the Lord Ordinary to hear parties thereon.'

**LORD GLENLEE.**—It is clear that the cautioners are only liable to make forthcoming the goods given up in the inventory, and it falls on the nearest of kin to show that part of this fund has not been thus applied, before they can have recourse on the cautioners.

**LORD PRYMYLY.**—I have no doubt on the general point. The case of Napier is directly applicable.

**LORD ALLOWAY.**—I admit the authority of that case, but I doubt if it is applicable here. A particular debt of £170 has been confirmed, and undoubtedly the whole expenses of recovering it, the debts of the deceased paid out of it, and all sums paid to the next of kin, form a proper deduction in a question with the cautioners. But there were intromissions to a large amount; and although the cautioners may be entitled to charge the expense of recovering the £170 confirmed, yet I doubt if they are entitled to take credit for the expense of recovering the funds, over and above that sum. Then, as to the expenses of the litigation, the cautioners cannot take credit for these, except in so far as proportioned to the sum confirmed, nor for any expenses prior to the confirmation, till which time the bond of caution did not exist.

**LORD JUSTICE-CLERK.**—The cautioners can never be liable for more than the sum confirmed, which must make the charge against them. But, as to the particulars of the items for which credit is asked, there is room for a little further explication.

*Suspender's Authorities.*—Napier, Dec. 19. 1740, (1849 and 1850); Guthrie, May 25. 1592, (2086.)

*Chargers' Authorities.*—S. Ersk. 9. 41; 2. Bell, 87.

**D. SCALES,—C. FISHER,—Agents.**

**K. M'LEAY, Pursuer.—Cockburn—Matheson.**

**No. 313.**

**H. ROSE, Defender.—A. M'Neill.**

*Process.*—Court adhered to a judgment of the Lord Ordinary, refusing to conjoin two processes in limine, before advising condescendences in them.

**M'LEAY** having raised an action against **Rose** for payment of a bill of £1000, the latter brought a process of count and reckoning, concluding for a large balance alleged to be due him in a multiplied course of transactions for many years, and he craved to have the two causes conjoined, before the Lord Ordinary had seen condescendences. This his Lordship refused, 'in respect 'this is a separate and independent action on a liquid ground of 'debt, in which the record may be closed, and the other is a 'general count and reckoning;' and the Court unanimously adhered.

**Feb. 17. 1826.**

**2d DIVISION.**  
**Lord Cringletie.**  
**B.**

**JOSEPH GORDON, W. S.—JAMES M'DONELL, W. S.—Agents.**

No. 314.

R. GRAY and Others.—*Speirs*.  
J. HENDERSON and Others.—*McNeill*.

Feb. 17. 1826.

2d DIVISION.  
Lord Mackenzie.  
M'K.

*Process*.—THE Court remitted to reponne Gray &c., who were abroad, against a final decree in absence in a multiplepounding, to which they had not been cited, and to receive their claim, on payment of such expenses as should be deemed reasonable.

G. DUNLOP, W. S.—Agent.

No. 315. DAVID JOHNSTONE, Pursuer.—*Sol. Gen. Hope—Graham Bell*.  
JOSEPH JOHNSTONE, Defender.—*Gillies*.

*Sequestration—Trustee—Penal Interest*.—Penal interest on sums in the hands of a trustee on a sequestrated estate ceases to run from the date of his removal.

Feb. 18. 1826.

2d DIVISION.  
Lord Eldon.  
F.

JOSEPH JOHNSTONE, the defender, having been removed, by a judgment of this Court in 1817, from the office of trustee on Arnott's sequestrated estate, the creditors elected in his place the pursuer, David Johnstone, who immediately raised an action of count and reckoning against the former trustee, concluding for payment of certain sums, being funds belonging to the bankrupt estate intromitted with by him, and not lodged in a bank in terms of the statute, and for penal interest thereof at the rate of 20 per cent. from the date of his intromissions until payment. It having been pleaded in defence, that the liability for penal interest must cease by the defender's removal, the Lord Ordinary reported the cause, to have this point determined by the Court. Their Lordships unanimously found, that penal interest ceased to run at the date of the defender's removal from the office of trustee.

LORD GLENMACK.—The chief thing to be considered is, what demand was competent against the trustee at the date of his removal? All that could then have been asked of him was payment of the monies in his hands, with interest at the rate of 20 per cent. on the excess above £50, but without any interest at all on the £50. Prior to removal, he is not liable at all for interest on money in his hands to the amount of £50. After removal, however, he is no longer so exempted, but must pay five per cent.; and in the same way, after removal, he is no longer liable at the rate of 20 per cent. on the surplus.

LORD PITMILLY.—The Act of Parliament applies only to persons acting as trustees, but not to any one when no longer a trustee.

When removed, the trustee must pay up the whole funds in his hands, (including the £50 for which he was not, while trustee, obliged to pay interest,) with 20 per cent. on the excess, and this whole fund then accumulated bears interest at the rate of five per cent., but no more.

The other Judges concurred.

W. DOUGLAS, W. S.—W. MARTIN,—Agents.

EARL of STAIR, Pursuer.—*Moncreiff*—H. J. Robertson.

No. 316.

EARL of STAIR'S TRUSTEES, Defenders.—*Sol.-Gen. Hope—Murray.*

*Trust.*—A party having, by a deed of settlement, conveyed his funds and interest thereof to trustees, to purchase lands in three particular counties, and to annex them to his entailed estate, and the greater part of the funds having, within three years from the death of the trustee, been so employed—*Held*,—1.—That the heir of entail had no right to the interest of the heritable sum;—and,—2.—That there had been no such undue delay as to entitle him to demand payment of it, even supposing he had a title to make such a demand.

THE late John Earl of Stair executed a trust-deed of settlement, by which he conveyed his estates and effects to the defenders for various purposes, and in particular 'to lay out the residue of the trust-funds and interest, and proceeds thereof, in purchasing lands in the shires of Wigtown, or Ayr, or Stewartry of Kirkcudbright, and at the sight and with the advice and consent of the Lord President of the Court of Session, and of his Majesty's Advocate for Scotland for the time being, to annex the same to my entailed estate, by taking the rights and securities of the lands so to be purchased to the same heirs of tailzie, and under the same conditions, &c. contained in the disposition and tailzie of my lands of Culquhassen and others executed by me.' His Lordship died in 1821, and the defenders took possession of the trust-funds, which amounted to about £200,000. They immediately proceeded to execute the trust, and in the course of three years purchased lands in the above counties to the extent of £145,000, which they annexed to the entailed estate. To this estate the pursuer had succeeded as heir of entail, and soon thereafter he brought an action against the defenders, to have it found that he had right to the interest arising subsequent to the period after the trust-fund had been realized.\* Lord Alloway and the Court assailed them from this claim, 'reserving to the pursuer to be heard, in case any improper or unnece-

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1st DIVISION.

Lord ELM.

D.

\* See note, Vol. II. No. 137.

'sary delay take place, whether he may not then be entitled to  
 'claim the interest of the residue of the funds not vested in  
 'lands, as a surrogatum for the lands so directed to be purchased  
 'and entailed upon him and the other heirs, and to the defenders  
 'their defences, as accords;' and this judgment was affirmed  
 on appeal. Thereafter the pursuer brought an action concluding  
 to have it found that he was entitled to the interest from and after  
 the 1st of June 1822, being twelve months after the death of  
 the late Earl of Stair, and as being a sufficient time for execut-  
 ing the trust. To this it was stated in defence,—1. That by  
 the terms of the trust-deed the defenders were bound to lay out,  
 not only the capital, but also the interest, in the purchase of  
 lands, and therefore the pursuer had no title to demand payment  
 of any part of that interest;—and, 2. That they had used the  
 utmost dispatch in the execution of the trust, by making pur-  
 chases to the extent of £145,000 in the course of three years;  
 and as they were limited to lands situated within three counties,  
 it was impossible to allege that there had been any such delay  
 as to entitle the pursuer to demand payment of the interest. The  
 Lord Ordinary found, 'That the late Earl of Stair died on the  
 '1st of June 1821, and that the trustees appointed by him, the  
 'defenders in the present action, accepted the office of trustees,  
 'and took possession of the trust-funds, which at that time  
 'amounted to about £200,000 sterling: That the defenders  
 'have stated in their defences that they have laid out the sum of  
 '£145,000 sterling in purchasing lands, as directed by the trust-  
 'deed, and that not above £35,000 sterling remained to be laid  
 'out: That the pursuer having raised an action against the trus-  
 'tees, concluding that he had right, under the trust-deed, to the  
 'whole interest, dividends, and proceeds of the real and personal  
 'estate left by the Earl of Stair, the testator, since the 1st day  
 'of June 1821, with other conclusions unnecessary to be stated;  
 'which action having come before Lord Alloway, certain pro-  
 'ceedings followed, upon which the First Division of the Court  
 'sustained the defences of the trustees, and assoilzied them from  
 'the conclusions of the action: That the pursuer having carried  
 'the cause by appeal to the House of Lords, the judgment was  
 'affirmed; but, at pronouncing judgment, it was stated by one  
 'of the Peers who moved the judgment, that the sentence of the  
 'Court of Session was affirmed, only in so far as it found that  
 'the pursuer is not entitled to the interest, dividends, and pro-  
 'ceeds of the estate from and after the death of Lord Stair;  
 'reserving entire to the pursuer to claim the said interest, divi-  
 'dends, and proceeds from and after any period after the de-



‘cease of the said Earl, before which it should reasonably be  
 ‘thought that the trustees ought to have employed the funds  
 ‘left by him, in manner pointed out by the trust-disposition:  
 ‘That no intention is indicated by the settlement of the testator,  
 ‘to the effect that the trust-estate was to be enlarged by accumu-  
 ‘lation: That four years having elapsed since the death of the  
 ‘testator, it is presumable that sufficient time has been allowed  
 ‘for the purchase of land, to be entailed according to the direc-  
 ‘tions given by him; and in respect of the delay that has taken  
 ‘place in making these purchases, and that there is no law or  
 ‘equity for subjecting the pursuer to a loss of the whole proceeds  
 ‘and issues of the fund unemployed, in consequence of such delay;  
 ‘found that it is the duty of the trustees, and that they are  
 ‘bound by law, to give a reasonable indemnity to the pursuer  
 ‘for the loss which he has sustained, and is likely to sustain,  
 ‘by such delay; and appointed the pursuer to give in a conde-  
 ‘scendence of his claim against the trustees upon that ground.’  
 The defenders having reclaimed, the Court altered the inter-  
 locutor, and assolvizd the defenders, ‘in respect that the truster  
 ‘has directed that the whole produce of the trust-estate, both  
 ‘principal and interest, accruing thereon, shall be laid out in  
 ‘the purchase of lands, and that the present is the first attempt  
 ‘made in Scotland for having any part of the trust-estate allotted  
 ‘to the heir in the mean time under such circumstances, and  
 ‘also in respect there has been no undue delay upon the part  
 ‘of the trustees in laying out the trust-funds as appointed by  
 ‘the truster.’

*Pursuer's Authority.*—Sitwell, 6 Vesey, 520. 544.

MACKENZIE and INNES, W.S.—J. and A. SMITH, W.S.—Agents.

J. M'LEISH, Pursuer.—*More.*

No. 317.

J. RENNIE, Defender.—*Ro. Bell.*

*Terce.*—Held, in a question with a singular successor, that a widow who had never served to her terce could not transmit to her executor the right to demand her share of the rents.

ROBERT FERGUSON died in 1793, infest in a house situated in Rose street of Edinburgh, leaving a widow. The house was sold by Ferguson's heirs to Alexander Lang. In the disposition there was introduced this clause: ‘And the said Alexander Lang also taking upon himself the chance and risk of any claim by the widow of the said Robert Ferguson for terce or otherwise

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 Lord Eldin.

D.

‘ on said subjects ;’ but this was not declared to be a real burden, nor to be engrossed in the infeftment. In 1806 Lang (who had not taken sasine) sold the property to James and Alexander Rennies, and assigned to them the unexecuted procuratory and precept, and warranted the subjects to be free of all burdens and incumbrances whatsoever. The Rennies were infeft in the course of the same year, and thereafter the property came to be vested exclusively in the defender James Rennie. The widow of Ferguson had never been served to her terce, and she died in 1822, being a period of 29 years from the death of her husband. By a deed of settlement she conveyed her effects generally in favour of the pursuer M’Leish, who brought an action against Rennie, concluding for payment of one third part of the rents since the death of Ferguson, in respect that they belonged to his widow in virtue of her right of terce. In defence it was pleaded,—1. That as the widow had never been served and kenned to her terce, the right to claim the rents could not descend to her representatives. —2. That, being a singular successor, Rennie could not be affected by such a claim, and that the introduction of the clause into the disposition in favour of Lang could not infer a liability against Rennie ;—and, 3. That the fruits having been *bonâ fide percepti et consumpti*, he was not liable to account. To this it was answered,—1. That the infeftment of Ferguson was a sufficient title to vest the right of terce in his widow, and to entitle her to recover one third part of the rents during her life ; and that as the right to these rents was conveyed to the pursuer under the general assignation in his favour, he had a good title to demand payment of them ;—and, 2. That there was evidence of Mrs. Ferguson having required payment of them, and that accordingly the conveyance to Lang (from whom the defender derived right) had been qualified with a declaration that he should take the risk of any claim by the widow. The Lord Ordinary found ‘ the defender liable ‘ to account to the pursuer, as disponee and executor of the deceased Ann M’Leod, for a third part of the rents of the subjects ‘ mentioned in the libel, from the time of his the said defender’s ‘ acquiring said subjects, to the time of Mrs. Ferguson’s death, ‘ in April 1822.’ The Court, however, altered, and assolizied Rennie, but found no expenses due.

**LORD HERMAND.**—As there was no service, the terce did not vest in the widow ; and if so, could she transmit to another that which she did not possess ? I apprehend she could not. Besides, can a purchaser be made liable where the burden has not been constituted in terms of law ? I am of opinion that he cannot, and therefore that the claim is not well founded.

**LORD GILLIES.**—This is a case of some difficulty. It is true that the claim of the widow transmits against the heir of her husband, because they are in joint possession, and she may make it effectual during her life; but it is another question whether, after her death, and where she has not been vested during her life, it can be transmitted to her heir. It is then too late to inquire whether she had right to it, and whether she is entitled to be served.

**LORD PRESIDENT.**—The clause in Lang's disposition makes the case neither better nor worse. Mr. Erskine states that 'a tancer, if she 'has once declared her right by service, transmits it, on her death, 'to her executors,'—thereby making the transmission to depend on the service; and this is confirmed by the decision in the case of Macaulay v. Watson in 1636. But here there was no service, and therefore the right could not transmit.

**LORD BALGRAY.**—The pursuer must show that the widow had a right to terce; but, as she is dead, this is now impossible.

**LORD CRAIGIE** was of a different opinion; and as it was a new case, he was desirous that it should receive further consideration.

*Defender's Authorities.*—2. Ersk. 9. 44. 50. 52; 2. Stair, 6. 13. 14. 15; 1. Bell, 46; Macaulay, Jan. 19. 1636, (3112); Maxwell, March 18. 1680, (16842); A. v. B. March 5. 1632, (15846); Yeaman, Dec. 1666, (15843.)

**W. FRASERSON, W. S.—D. and A. THOMSON, W. S.—Agents.**

**J. SIMPSON and A. MORISON, Advocators.—Moncreiff.**

No. 318.

**MRS. GARDINER, Respondent.—Anderson.**

*Cautiomer.—Exactor.*—Circumstances in which it was held that a cautiomer for an executor was entitled to demand to be relieved; but that sufficient relief would be afforded by the executor accounting for intrusions, paying the balance to the party having right to it, and obtaining a decree of exoneration.

**JAMES GARDINER** having died intestate, leaving an only son and considerable funds, his widow obtained herself confirmed executrix-dative, qua relict, for behoof of herself and her son. Simpson became her cautioner for the due performance of the office, and Morison bound himself as attestor. At the distance of some years thereafter, and while the son was still in minority, Simpson and Morison brought an action before the Magistrates of Banff, concluding that Mrs. Gardiner should be ordained, either to relieve them of their cautionary obligation, or to deposit the executry funds in such a manner that they could not be uplifted or disposed of, unless with their knowledge and approbation. In defence it was maintained, that as it was not alleged that she had misapplied the funds, or was vergens ad inopiam, they had no right to demand relief. The Magistrates found that Mrs. Gardiner, 'at common law, is bound to relieve the pursuers of the

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8.

‘ said obligation, and all the consequences thereof, and decerned her to relieve them accordingly ; but found, that unless the pursuers will allege, and offer to instruct, that the defender has misapplied any of the executry funds, or that she is vergens ad inopiam, they are not entitled to any thing further than the above mentioned relief at common law.’ Simpson and Morison having brought an advocacy, Lord Alloway found ‘ in terms of the first alternative conclusion of the advocates’ libel, that the respondent is bound to free and relieve the advocates of the cautionary obligation come under by them for her by the bond of cautionry libelled, and attestation of said bond, by granting sufficient and satisfactory security to them for their complete relief ; and that they, and their heirs and successors, shall be harmless and skaithless kept from payment of the sums of money contained in said bond, and of the said bond itself, and of all cost, skaith, damage, interest, and expenses that they, or either of them, or their heirs, shall happen to sustain or incur, or be put to thereby, in any manner of way.’ Mrs. Gardiner then raised an action against her son, (to whom a curator ad litem was appointed,) and called Simpson and Morison as parties, concluding that she should be ordained to exhibit a state of her intromissions, to pay over the balance to her son, and that thereupon both she and her cautioners should be exonerated and relieved of their obligations. Having at the same time represented against Lord Alloway’s interlocutor, Lord Eldin conjoined the actions, recalled the interlocutor, decerned in the action of exoneration and relief, and assoilzied her from that at the instance of Simpson and Morison. Against this interlocutor they reclaimed, and contended that they were entitled to a judgment in terms of the interlocutor pronounced by Lord Alloway—that a decree of exoneration could not relieve them from the claims of third parties, nor even from that of the son, who was still in minority, and who would be entitled to object to the decree on that head. The Court found, ‘ That the defender and respondent, Margaret Gardiner, is bound to free and relieve the pursuers and advocates, James Simpson and Andrew Morison, of the cautionary obligation libelled on, come under by them upon her account, but that relief will be afforded by the said Mrs. Margaret Gardiner fulfilling the conditions of the libel of count and reckoning and exoneration at her instance ; and therefore recalled Lord Eldin’s interlocutor, in so far as inconsistent with these findings, and adhered quoad ultra.’

MACMILLAN and GRANT, W. S.—CRAWFORD and ANDERSON, W. S.—  
Agents.

**JAMES BROWN, Advocate and Suspender.—Cunninghams.**  
**GEORGE BROWN and TRUSTEE, Respondents and Chargers.—**  
*D. of F. Cranstoun—Forsyth.*

No. 319.

*Landlord and Tenant.*—A landlord having given part of a farm to road trustees for the purpose of making a road, held not entitled to payment of the rent of that ground, leaving the tenant to obtain indemnification from the trustees, but bound to allow a deduction of rent effieiring to the ground so conveyed.

IN 1818, George Brown agreed with the trustees of the Lochlibo road to give them land necessary for making the road passing through his property of Overgree, but stipulated that he should be entitled to the solum of the old road. Nothing further was done till 1820, when the terms of the agreement were finally settled,—George Brown then stating, that ‘he takes no burden on him for the tenant in Overgree, as he only acts, in the present instance, as proprietor.’ The trustees having taken possession of the ground, James Brown, to whom the lands had been let in 1818, pleaded, in various processes of sequestration brought by the landlord, that he was entitled to retain a proportion of the rent effieiring to the quantity of his farm taken possession of by the trustees, and he also raised an action before the Sheriff of Ayrshire to have this determined. On the other hand, the landlord contended that the trustees were, by act of Parliament, bound to indemnify both landlord and tenant for their respective loss or damage, and that the tenant’s remedy therefore lay against them. The Sheriff having repelled the tenant’s plea, and given judgment against him, he brought advocations and suspensions of the various processes, on the ground that it was only for incidental damages that a tenant had any claim against road-trustees; but that, in regard to his being deprived of the land, his claim necessarily was for deduction of the rent from the landlord, who was entitled to stipulate a price for the ground from the trustees, on account of this loss of rent on his part. The Lord Ordinary remitted simpliciter, reserving to the tenant his claims against the road-trustees, and to them their objections thereto; but the Court unanimously altered, found the tenant entitled to deduction of rent effieiring to the ground occupied by the trustees, and remitted to the Lord Ordinary to receive a condescendence as to the extent.

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 Lord Cringletie.  
 B.

**LORD JUSTICE-CLERK.**—The simple question is, whether a portion of the farm has been taken away from this tenant without his consent? And this being the fact, it is clearly impossible that the landlord can insist on his paying rent for a part of the farm of

which he has deprived him by his own act and deed, and hand him over to the trustees, against whom he can have no claim. The other Judges concurred.

JAMES STUART,—D. FISHER,—Agents.

No. 320.

A. LINDSAY, Advocate.—*Jeffrey—Newnes.*  
R. CHAPMAN, Respondent.—*Moncreiff—Sir J. Hay.*

*Proof—Witness—Marriage.*—Two declarators of marriage having been raised by different parties against the same woman, and conjoined; and she having, by her conduct in the cause, identified herself with one of the pursuers—*Held*,—1.—That her brother and sister were not admissible as witnesses on his behalf, and that he could not found on her judicial declaration.—2.—That the party was not barred from pleading these objections because they did not appear on the record, which merely stated that objections were taken as on a paper apart, no such paper having been lodged.

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2d DIVISION,  
Bill-Chamber.  
Lord Medwyn.

IN May 1820, Chapman raised an action of declarator of marriage against Mrs. Catherine Forgan or Patullo, on the allegation that, in the November proceeding, she had acknowledged a marriage with him, and that they had afterwards lived a few days together in his house as man and wife. In July thereafter, Lindsay, who was then living with Mrs. Patullo as her husband, also raised a declarator of marriage against her, averring, that prior to that alleged to have taken place with Chapman, a marriage had been entered into with him by means of a promise subsequente copula. To Chapman's action defences were lodged by Mrs. Patullo, stating, that prior to the declaration and cohabitation libelled by him, she had become the wife of Lindsay, and had been served with a summons of declarator of marriage at his instance, to which 'she can state no defence,' and which she suggested should be conjoined with that at Chapman's instance. The actions were accordingly ultimately conjoined, and the case on the part of Lindsay and of Mrs. Patullo was thereafter conducted by the same solicitor. A motion had been originally made by Chapman, before Lindsay's action was raised, to have Mrs. Patullo judicially examined, and, after the processes were conjoined, she was allowed to be examined on the interrogatories of both parties, and in answer to those of Lindsay, she declared that in the course of autumn 1819 she agreed to become Lindsay's wife, and authorised the proclamation of banns on a Sunday in the beginning of November:—that, on the day before, Lindsay came to her house, by her appointment, for the purpose of having the names given up for proclamation, and that he and her brother went in the afternoon to the session-clerk for that purpose:—that they returned to her house the same night after she had gone to bed, and came into her room to

tell her that the names had been given up:—that her brother then said to Lindsay, ‘She is as much yours as she ever will be:’—that she did not say any thing against this, and that Lindsay then came to bed to her, and had carnal connexion with her. She further declared, that in the evening of the next day (Sunday,) after the banns were proclaimed, Chapman came to her house, and represented Lindsay and his family as being deeply in debt, and persuaded her to leave her house with him:—that she did so, intending to go to some friends in Fife, and that, before she had gone far, she became anxious to return home, but that Chapman would not permit her. Being also interrogated, on the part of Chapman, in regard to the alleged marriage and cohabitation with him, she declined to answer any of his questions, as tending to accuse her of bigamy.

The Commissaries having allowed to Lindsay a proof of his allegations, and to Chapman a proof of the relevant averments made by him in a minute, which he was permitted to lodge in answer to Lindsay’s condescendence, Lindsay offered his own father and brother as witnesses; but these were rejected by the Commissaries as inadmissible, and he then adduced the brother and sister of Mrs. Patullo, whose admissibility was objected to on grounds not appearing on the record, which bore the objections to be stated on a paper apart, but no such paper had been lodged. The Commissaries repelled the objections, and the witnesses being examined, deponed to circumstances confirmatory of the facts stated by Mrs. Patullo in her judicial declaration. Previous to the examination of these witnesses, the session-clerk of the parish had been adduced, and deponed that Lindsay and Mrs. Patullo’s brother had, on the Saturday, given up the names for proclamation, and that they had been proclaimed accordingly the next day for the first time, but that, before the succeeding Sunday, he received a letter from Chapman, desiring him not to proceed with the further proclamation, and also one from Mrs. Patullo to the same effect, which was produced, and was of the following tenor: ‘As I have totally altered my mind in respect to marrying Alexander Lindsay, I request you to stop the proclamation, as I am become Robert Chapman’s lawful wife.’ Several witnesses were examined for Chapman, from whose testimony it appeared that Lindsay and Mrs. Patullo did not consider themselves as married persons, and in particular that Lindsay had at first raised an action of damages against Chapman, on the ground of the latter having prevented his marriage with Mrs. Patullo:—that they had made proposals for an arrangement with him, the terms of which implied that they considered the child, of which Mrs.

Patullo had become pregnant, to be Chapman's:—that they had applied to a surgeon for medicines for the purpose of procuring abortion:—and that both parties had declared to the clergymen of their respective congregations that they were free of each other. On advising this proof, the Commissaries were equally divided in opinion as to its import, and judgment was accordingly pronounced against the pursuer Lindsay, assolzieing Mrs. Patullo from the conclusions of his action. He thereupon presented a bill of advocacy, which having been reported by the Lord Ordinary on memorials for Lindsay and Chapman, the Court ordered additional memorials, 'particularly on the point, whether it is competent for the pursuer Lindsay to found upon the judicial declaration of the defender Mrs. Patullo, and upon the evidence of Elizabeth and William Forgan, the sister and brother of the said defender,' and senior counsel were subsequently heard on the question. For Chapman it was contended,—1. That Mrs. Patullo had, by her own conduct in the cause, identified herself with Lindsay, whose action was evidently brought merely as a defence against that of Chapman, to which she was the defender, and the proof therefore adduced by Lindsay was to be considered as led in defence against Chapman; that, consequently, it was impossible to allow her defence to be proved by her own declaration, or by the evidence of her own relations, especially as this evidence was not in confirmation of other unexceptionable testimony, but was the sole proof of that which constituted the alleged marriage; and that if such latitude were allowed, it would enable women living in adultery to prove a prior marriage with their paramours by their own relations, and thus lead to the most dangerous consequences in regard to the rights and status of individuals;—and, 2. That there was no room for the exception founded on a necessary penuria testium, as the manner of completing the alleged marriage had been the choice of the parties themselves, who were alone the cause of any such penuria. On the other hand, it was pleaded for Lindsay,—1. That collusion or combination on the part of Mrs. Patullo with him to make a false statement could only be inferred by assuming the statement made by her to be false, of which no evidence had been produced;—2. That there was a penuria testium necessarily existing in cases of marriage, and that whether regularly or irregularly celebrated, as none but relations were generally present on such occasions;—3. That the evidence having been actually received, it could not be objected to;—and, 4. That the objections did not appear on the record. The Court, 'in respect that the declaration of Agnes Patullo was incompetent in the conjoined processes, and could afford no evi-



'dence in her own favour, or in favour of Lindsay, with whom she had made a common cause, and in respect that her brother and sister were inadmissible as witnesses on account of their relationship to her,' unanimously refused the bill of advocacy.

**LORD PITMILLY.**—This is a case so peculiar both in its circumstances and the mode in which it has been conducted, that the decision can scarcely be founded on as a precedent in any other. Lindsay and Mrs. Patullo were living together when Chapman's action was brought, and Lindsay's was not raised till afterwards, and was evidently for the sole purpose of meeting the previous declarator by Chapman. Mrs. Patullo's defences to this action, and her whole conduct, show an anxious desire for the success of Lindsay. She employs the same solicitor with Lindsay;—she states that she can make no defence against his action;—she moves to have the two processes conjoined, that Chapman may be the party on the one side, and she and Lindsay together on the other;—and she joins along with him in defending against Chapman. It is unnecessary to speak of collusion, for the real case is, that Mrs. Patullo appears as defender against Chapman's action; and the manner in which she pleads her defence, is by getting Lindsay to bring his action against her. It is exactly the same as if she had pleaded in defence to Chapman's action that she was married to Lindsay; and she therefore being the party defender, cannot make use of her own declaration, and of the evidence of her relations, to support her defence, and as little can Lindsay, acting along with her, do so. This is a case much stronger than those of Dalziel against Richmond, and Stirling against Hamilton. I do not doubt but that the evidence of relatives, in cases of this description, may be received in corroboration of other testimony; but this cannot apply here, as it is the copula which is here offered to be proved by relations alone; for the other evidence as to the proclamation of banns rather goes to disprove the copula, as it evinces an intention to celebrate a regular marriage at some distance of time. On the whole, I am of opinion that Lindsay cannot make use of this evidence, and that his bill must therefore be refused.

**LORD ALLOWAY.**—I agree in all the general views which have been taken by Lord Pitmilley; but I consider the decision we are about to pronounce to be most important as a precedent, and not dependent merely on the peculiarities of this case. I do not go so far as to say that relations may not be received, in particular circumstances, in cases of clandestine marriages. There may be such cases, but the general rule is against their admissibility, and it is only as exceptions, and to corroborate other evidence, that they are received. But there is no case in which marriage has been allowed to be proved solely by the evidence of relations; and if

such a doctrine were admitted, it would be attended with very dangerous consequences. If ever there was collusion, it is here. The parties are identified; and consistently with the doctrines laid down in the cases of Dalziel, of Stirling, and of Bell, it is impossible to allow the evidence in this case to be founded on.

**LORD GLENLEE.**—I was relieved of much doubt by attending specially to the circumstance of Chapman's action having been raised first. Against that action Mrs. Patullo might have pleaded in defence her prior marriage. But, in order to evade the difficulty of leading her evidence, she has had recourse to this measure of Lindsay's action. She cannot, however, be allowed to be thereby in a better situation than she would have been, had she been merely a defender in Chapman's action, Lindsay's being her defence against it. It is said that her judicial examination was on the motion of Chapman, and so far as she was examined by him, her declaration may be admissible as evidence, but it cannot be admitted so far as she was examined in chief by Lindsay.

**LORD JUSTICE-CLERK.**—I entirely concur that the evidence in question cannot legally be founded on. The identification of Mrs. Patullo with Lindsay is completely made out by the circumstances of the case. Chapman's is the leading action, and Lindsay's is brought forward merely as a defence; and it is of importance to observe, that it is Mrs. Patullo who prays to have the actions conjoined, and that she accompanies this with a declaration, that she has no defence against Lindsay's. The penuria here is the act of the parties themselves; and where parties are the creators of the penuria, I shall always look to the admission of relations with great jealousy, even when their testimony is to be merely corroborative; but when that which is essential to the constitution of a marriage is to be established by relations alone, their testimony cannot be admitted; and we cannot overlook the consequences which would result, were such evidence allowed. I have always considered the case of Dalziel v. Richmond as laying down a principle which ought never to be deviated from, and I consider the present decision as establishing an additional precedent in support of the same principle.

*Advocate's Authorities.*—4. Stat. 3. 8; 4. Stat. 30. 16; 4. Stat. 2. 26; 3. Stat. de Consensu Clement. 41. 5; 2. Stat. de Probat. 1024. 23. 24; Glasgow, 253; Barber, July 1738, (16748); Young, Dec. 1738, (16743); Cuning, March 5. 1748, (Kilk. 539); Nicolson, Dec. 6. 1779, (16770); Marshall, June 26. 1796, (as rev. in H. of L.)

*Respondent's Authorities.*—Tait, 836; Stirling, July 11. 1704, (372); Dalziel, July 10. 1790, (16780); Bell, Jan. 21. 1797, (16785.)

W. SMITH,—W. BELL, W. S.—Agents.

H. FENWICK, Advocate.—*Forayth*.  
J. B. DOW, Respondent.—*Jameson*.

No. 321.

*Process—Law-Agent.*—Held, that a summary action is competent against a law-agent, concluding for delivery to his employer of money recovered on his behalf, (the agent's account being paid,) and also for delivery of papers.

FENWICK, a grocer in Dunbar, being creditor of Robertson and others, fishermen there, obtained an order from them on one Saunders of Leith, for payment of £22, and Saunders accordingly promised to pay that money to Fenwick. In consequence of this, Fenwick delivered an order to Dow, a writer in Leith, on Saunders, authorizing him to receive the money on his behalf. Of this sum (after some correspondence with Saunders) Dow admitted that he had obtained £12, which he promised forthwith to remit to Fenwick. Having, however, delayed to do so, Fenwick presented a summary petition to the Sheriff of Edinburgh, praying for a warrant on 'the said James Bell Dow immediately to deliver over to the petitioner or his agent, not only the aforesaid sum of £12 improperly kept up by him, with interest thereon since he received the same from the said John Saunders, but the order on the said John Saunders, and the letters from that person, promising payment of the sum therein contained.' After some litigation, the Sheriff ordained Dow to deliver up the money, under deduction of his own account of expences in recovering it, and also the order and letters. Dow then brought an advocacy, and contended that as the action was founded on the contract of mandate, which merely inferred an ordinary obligation, it was incompetent in a summary form. To this it was answered,—1. That as Dow had been employed in the capacity of a law-agent to recover money, and had actually received it, and failed to remit it, he had been guilty of a breach of duty in his official character, and that it was therefore competent to apply for redress in a summary shape to the Sheriff, before whose Court he practised.—2. That the money had been paid to him, to be delivered over to Fenwick, who was therefore entitled to recover it out of his hands by a summary process;—and, 3. That there was, besides, a conclusion for restitution of papers, which rendered the action competent. The Lord Ordinary found 'that the action before the Sheriff was incompetent,' and therefore dismissed it; but the Court altered, repelled the reasons of advocacy, and remitted simpliciter.

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1st Division.

Lord Eldon.

S.

LORD PRESIDENT.—If there had been a factory of long standing, and it had been necessary to go into an accounting, a summary

action might have been incompetent ; but can it be maintained that if I give money to my clerk, or to my servant, for a particular purpose, and he choose to keep it, that I am obliged to proceed by an ordinary action ? Certainly not. And if not so, then, as Dow was merely employed as the hand whereby to obtain and remit the money, he is in the same situation. Besides, there is a prayer for delivery of papers, which is unquestionably competent in a summary form.

The other Judges concurred.

*Respondent's Authority.*—4. Eas. 1. 9.

J. TAYLOR,—D. FISHER,—Agents.

No. 322.

C. R. BROUGHTON.—*Bell—Hamilton.*

J. WESTON.—*Jeffrey—Cunninghame.*

*Triennial Prescription.*—Circumstances in which it was held that an open account contracted in England by a Scotman who died abroad in the King's service, and of which the last article had been delivered recently after his death ; and it being admitted by his executor that he had not paid the account,—the triennial prescription did not apply, although more than three years had elapsed from the date of the last article.

Feb. 24. 1836.

1st DIVISION.  
Lord Eldon.

THE late Colonel M'Neill, a native of Scotland, but who resided chiefly in England, employed Weston as his tailor in London, and contracted a considerable account with him from 1800 to 1808. In the course of the year 1807 he went to Louisiana as his Majesty's envoy, where he died in October 1808. During his residence there, he ordered several articles to be sent to him by Weston, the last of which was in the month of August 1808, but they did not arrive in Louisiana until after his death.

By a deed of settlement he conveyed his whole effects to Broughton and others, as his trustees and executors ; and Broughton, having alone accepted, took possession accordingly. In 1820, Weston obtained a decree in absence, for the amount of his debt, (the account of which terminated in August 1808 ; ) and having executed arrestments in the hands of one of the debtors of the late Colonel M'Neill, a multiplepoinding was brought, in which Weston claimed payment of his debt. This was objected to by Broughton, who contended,—1. That although the debt had been contracted in England, yet as Colonel M'Neill was a Scotchman, possessed both of heritable and moveable property in Scotland, and was an officer in the King's service, he must be held to have been domiciled in Scotland during the currency of the account ; that therefore the question must be decided by the law of this

country; and that as more than three years had elapsed from the last article in the account, prior to the date of the action, the claim had incurred the triennial prescription;—and, 2. That, at all events, it was extinguished by the English statute of limitations: and that although Colonel M'Neill had gone beyond seas, yet, as he had there died during the currency of the account, his executor thenceforth became the debtor, and as he had been resident in this country, the exception pleadable on the ground of being beyond seas did not apply. To this it was answered,—

1. That it was true that the case was to be decided by the law of Scotland, but that the triennial prescription, which rested on a presumption of payment, was inapplicable, seeing that as the contraction of the debt was admitted, and as part of the articles had been delivered subsequent to the death of Colonel M'Neill, it was impossible that he could have paid the debt, and it was not alleged that it had been paid by Broughton as his executor;—and, 2. That the statute of limitations, even if the case were to be governed by the English law, did not apply, because Colonel M'Neill was beyond seas, and Broughton held his effects under a trust for payment of his whole debts, and it had been settled in England that debts which are due in equity, although liable to the statute of limitations, must be paid under such a trust. The Lord Ordinary 'repelled the plea of prescription, and other 'objections to Mr. Weston's claim, and ranked and preferred 'him upon the fund in medio for the amount thereof;' and the Court adhered.

**LORD HERMAND.**—This case must be decided by the law of Scotland, because it cannot be held that Colonel M'Neill ever changed his domicile. The question therefore is, whether the triennial prescription applies? He died before the last article was delivered, and consequently he could not have paid it; and it is admitted by Broughton, that although he holds the money of the Colonel, yet he did not pay the debt,—so that there is no room for applying the presumption on which the triennial prescription is founded.

**LORD CRAIGIE.**—I concur so far, as that this case must be decided by the law of Scotland; but I apprehend that although it is usual for parties to state to the Court the circumstances of the case, yet as three years have elapsed from the last article of the account, we must hold that the debt has incurred the triennial prescription, and, consequently, that the constitution and the resting-owing can only be established by the writ or oath of the party.

**LORD GILLIES.**—I agree with Lord Craigie as to the law which he has laid down; but the question is, whether it can receive effect in this case. It is clear that the debt was not, and could not have

been paid at the period of Colonel M'Neill's death, and therefore it was resting owing at that time. Now it is admitted by Broughton that he did not pay the debt; and therefore it would be superfluous to refer to his oath, whether he had done so or not.

LORDS PRESIDENT and BALDWIN concurred in this opinion.

*Broughton's Authorities*.—(1.)—Kerr, Feb. 20. 1771, (4522); Barret, Feb. 4. 1772 (4524); 3. Ersk. 7. 48.—(2.)—2. Jac. I. ch. 16. § 2.; 4. T. R. 800.

*Weston's Authorities*.—(1.)—Syme, Jan. 15. 1789, (5354); Lealie, Nov. 15. 1808; (F. C.)—(2.)—4. and 5. Q. Anne; 1. Falk. 154; 2. Vern. 141.

J. CHEYNE, W. S.—Æ. M'BKAN, W. S.—Agents.

No. 323.

J. M'GOWAN, PURSUER.—*Sol.-Gen. Hope*—J. W. Dickson.

D. M'KELLAR, DEFENDER.—*Moncreiff*—Pyper.

*Bill of Exchange—Conjunct and Confident*.—Held,—1.—That a holder of a bill, acquired at the distance of five years after it had fallen due, is entitled to the privileges of a holder prior to the term of payment, there being no marks of dishonour on the bill;—and,—2.—That a party who has married the sister of the wife of another, is not thereby a conjunct person with that party.

Feb. 24. 1826.

1st Division.

Lord Eldon.

H.

M'GOWAN brought an action against M'Kellar for payment of a bill of £155 accepted by him in favour of M'Callum, dated 1st June 1818, and payable on the 3d of December of that year, and which was indorsed by M'Callum to M'Gowan in December 1823. In defence against this action, M'Kellar stated that the bill had been accepted by him for the accommodation of M'Callum;—that in 1822 a submission had been entered into between them, relative to claims against each other, and that, during the dependence of it, M'Callum had fraudulently indorsed it to M'Gowan, who resided in the same house with him, was married to a sister of M'Callum's wife, and was engaged in trade with him. He therefore contended,—1. That as the bill had been indorsed at the distance of five years subsequent to the term of payment, all objections which were competent against M'Callum were equally so against M'Gowan;—and, 2. That being married to a sister of M'Callum's wife, and from the situation in which he was placed, he must be held to be conjunct and confident with him; and that this, combined with other circumstances, established that he had been participant in the fraud of M'Callum. To this it was answered,—1. That he was an onerous and *bonâ fide* indorsee, the reverse of which could only be proved by his writ or oath; that the bill had no marks of being dishonoured, and that it preserved its privileges entire for the period of six years;—and, 2. That although it was true that he had married a sister of M'Callum's

wife, yet this did not make him a conjunct person; and he denied the allegations as to fraud. The Lord Ordinary assailed M'Kellar; but the Court altered, and decreed in terms of the libel, reserving to M'Kellar to prove his allegations of non-onerosity and mala fides by the oath of M'Gowan.

**LORD BALGONY.**—I have looked at the bill, and I see no mark on it to create any suspicion that it was a dishonoured document. If there had been any thing appearing *ex facie* to create such a suspicion, this might have had an effect on the question of bona fides; but as there is none, this bill continued to be a negotiable document till it was extinguished by the lapse of six years. M'Kellar must therefore prove his allegations of non-onerosity and mala fides by the oath of his opponent.

The other Judges concurred in this opinion; and they also held that the circumstance of M'Gowan being married to the sister of M'Kellar's wife did not make him a conjunct person.

*Pursuer's Authorities.*—4. *Enk.* 2. 81; 1. *Stair*, 9. 15; *Wight*, June 24. 1809, (F. C.); *Crawford*, June 20. 1814, (F. C.); *Wilkie*, Nov. 30. 1821.

*Defender's Authorities.*—2. *Bell*, 198; *Thomson*, Nov. 18. 1823, (ante, Vol. II. No. 484.)

**M. PATTISON**,—**MACMILLAN and GRANT, W. S.**—Agents.

**W. ARROL and J. COOK**, Pursuers.—*Moncreiff—Jameson.*

No. 324.

**R. MONTGOMERY**, Defender.—*Greenshields—More.*

**Bankrupt—Pactum Illicitum.**—A creditor having privately obtained bills from a bankrupt, as the price of his agreeing to a voluntary composition and discharge, and the amount of these having been paid to onerous third parties to whom he had indorsed them, held liable in repetition, in an ordinary action at the instance of the bankrupt and the cautioners for his composition.

**ARROL** having become insolvent, offered his creditors a composition of 9s. in the pound, but finding that his estate would not afford this, he reduced his offer to 8s., payable by instalments at six, nine, and twelve months; for payment of which, Cook, one of the creditors, along with another person now deceased, became cautioner, taking from Arrol a bond of relief, containing a conveyance to all his property in security of their obligation. All the creditors agreed to accept of this composition; but Montgomery, who held a bill of the bankrupt for £900, demanded a further consideration as the price of his consent; and accordingly, without the knowledge of the cautioners, or of the creditors, (with the exception of one individual,) Arrol gave Montgomery two bills of £89 each, payable at eighteen and twenty-one months.

Feb. 24. 1826.

2d Division.  
Lord Cringetie.  
B.

These bills Montgomery indorsed to third parties, who charged Arrol on them when they became due. He brought a suspension of the charge; but the Court, considering the indorsers to be bona fide and onerous holders, found the letters orderly proceeded, and he was accordingly obliged to pay the amount. Thereafter, however, he raised a summons, along with Cook the cautioner, against Montgomery, concluding for repetition of the amount of the bills, and of the expenses incurred in the suspension. In defence it was pleaded,—1. That the transaction complained of could only be challenged by reduction;—and, 2. That Arrol the bankrupt had no title to pursue, and Cook the cautioner no interest, as he had not suffered any damage by his cautionary obligation. The Lord Ordinary appointed Cook to state ‘to what extent he is in advance to the defender Arrol by having paid the bills granted as a composition for the latter’s debts, and to produce evidence of such payments made out of his own funds;’ and on Cook’s failure to obtemper this order, his Lordship ‘held him as confessed that he is no way in advance for the other pursuer, by having paid any part of the composition payable by the latter to his creditors, and therefore, in respect of the reasons fully assigned in the note, assoilzied the defender.’ Against this interlocutor the pursuers gave in a representation, accompanied with a declaration by Cook, stating that, at the time of Arrol’s bankruptcy, he was a creditor to the extent of upwards of £1400, on which he had received no part of the composition, and that he had advanced money to Arrol to enable him to pay his composition, to an amount which, along with the composition on his own debt, made his present claims against Arrol extend to £2000; and as to the appointment to produce evidence of this, he stated, that ‘it has never been disputed by the defender that he was a creditor of Arrol, and it is therefore unnecessary to produce evidence of that fact; and with regard to the composition to Mr. Arrol’s creditors, he advanced money to Mr. Arrol to enable him to pay the composition; but he has no evidence to produce of payment of the composition made by him directly to Mr. Arrol’s creditors.’ Thereupon the Lord Ordinary adhered to his former interlocutor; but the Court altered, and decerned in repetition of the amount of the two bills;—remitting, however, to the Lord Ordinary to hear parties as to the conclusion for expenses incurred in the suspensions of the charges at the instance of the indorsers.

The LORD ORDINARY stated as the grounds of his interlocutor, that while he considered a transaction of the description occurring here as liable to be set aside, this could not be done by the bank-





rupt himself; but only by the creditors, to whose prejudice it had been entered into, or the cautioners, who had sustained loss by advances in payment of the composition; but that there was no evidence of Cook's being a creditor, or having suffered by payment of any part of the composition; and further, in regard to the bankrupt himself, that the compact was illegal, but that Montgomery having obtained payment, the rule of law applied,—in *turpi causa potior est conditio possidentis*.

**LORD JUSTICE-CLERK.**—Although this is the case of a private composition, and does not fall under the provisions of the bankrupt act, I cannot concur in the Lord Ordinary's interlocutor. It is a very grave question indeed, whether, when all the creditors of a bankrupt agree to a composition-contract, and subscribe his discharge, it is lawful for one or more of these, behind the backs of the others, to take advantage of the bankrupt's situation, and extort from him bills, money, or promises, to put them in a better situation than their co-creditors. It is of no consequence that the bankrupt here has been obliged to pay the bills to the onerous holders. The transaction is illegal at common law,—*contra bonos mores*,—and opposed to the essential principles of justice, whether in regard to private compositions, or those under the bankrupt act, the terms of which tend to confirm the view of the illegality of such a transaction at common law. Such being the case, the question comes to be, Have we proper pursuers here? I conceive that the objections are not good; either to the one pursuer or the other, and that the maxim *potior est*, etc. does not at all apply. If a bankrupt has been compelled to submit to this extortion, he is entitled to demand restitution, and this title of the cautioner is much more clear, especially when he is also a creditor, as I hold him to be here. The case of Junner is quite decisive, and that of Denohar, founded on by the defender, proceeded solely on the informality of having recourse to a petition and complaint after the sequestration was at an end.

**LORD GLENLEITH.**—I do not doubt that, in a private composition, one creditor may legally take the composition, and yet bargain for something more, if he do this openly before all the creditors, and publicly refuse to accede, unless he obtain such advantage. But if he does this, keeping the body of the creditors in ignorance, and leading them to believe that all are getting the same composition, there is a plain reason for voiding the whole transaction; and the cautioners, as well as the creditors, would have sufficient interest to set it aside, as diminishing the means of relief to which they are entitled, whether stipulated in the bond or not; and we cannot take it for granted that they will not suffer by it. As to the bankrupt himself, there is more difficulty, and room for a good deal of argument on the maxim in *turpi causa*, etc. The circumstance of the bills here having been paid makes no difference, as there was

no voluntary payment. The defender, by his own act, and on purpose to evade the question, put it out of the bankrupt's power to resist the action for payment, and the case must be judged of as if the bills had not been indorsed away. I should, however, be inclined to find that the bankrupt should make the amount recovered forthcoming to the other creditors.

**LORD PITMILLY.**—This is a case of very general importance. There are three points to be considered. 1. As to the title of the bankrupt himself:—The transaction on the part of Montgomery was in fact an attempt to take from him, by extortion, an additional sum beyond what constituted a fair composition. *Res ipsa loquitur*,—the transaction itself proves fraud and extortion against the bankrupt, and he has therefore a clear right to set it aside; and it would not even be a fair procedure for a creditor to stipulate openly for something more than the composition, while he acceded to it along with the rest. In so far as regards the bankrupt, he might still set it aside. It is said that he is *particeps fraudis*, and that, in *turpi causa, potior est conditio possidentis*. This proceeds, however, on the idea that the fraud is against the creditors; but it is in fact against the bankrupt himself, and the maxim therefore does not apply. 2. As to the cautioner:—It is no matter whether he has paid the composition or not; he runs a risk by becoming cautioner, and has a fair interest to take care that the contract is properly carried into effect; and in the present case he is also a creditor, and has not got payment of his own debt. 3. In regard to the form of action:—There is no necessity for a reduction, and a *condictio indebiti* is the proper legal remedy.

**LORD ALLOWAY** concurred in all respects, and further observed, that the general principle applicable to the law of this and every other country in reference to the maxim in *turpi causa*, etc. was well laid down by Lord Mansfield in the following remarks:—‘If the act is in itself immoral, or a violation of the general rules of public policy, the party paying shall not have his action; for where both parties are equally criminal against such general laws, the rule is, *potior est conditio possidentis*. But there are other laws calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant take advantage of the plaintiff's situation, then the plaintiff recovers, and it is astonishing that the reports do not distinguish between the violation of the one sort and of the other.’

*Pursuers' Authorities.*—4. Cook's Bank. Law. 447; Riddell, Nov. 20, 1821, (ante, Vol. 1. No. 183); Junner, Feb. 15, 1822, (ante, Vol. 1. No. 365.)

*Defenders' Authorities.*—Deuchar, &c. May 15, 1819, (F. C.); Stude, May 23, 1806, (not rep.); Brice and Graham, Feb. 28, 1818, (F. C.)

CAMPBELL, and CLASON, W. S.—C. J. F. ORR, W. S.—Agents.

Sir M. S. STEWART.—*Jeffrey.*

No. 325.

J. C. PORTERFIELD.—*D. of F. Cranstoun.*

## Competing.

*Competition of Brieves—Process.*—Judgment repeated pro forma in a competition of brieves with the son and heir of a party, in a competition with whom a decision had been pronounced and taken to appeal.

SIR MICHAEL SHAW STEWART, eldest son and heir of the party in the competition of brieves mentioned ante, Vol. I. No. 6. having determined to enter an appeal against the judgment of this Court, was advised to take out a brieve in his own name, to be carried before the House of Peers at the same time. He accordingly purchased a brieve for serving him nearest heir of tailzie and provision in the lands of Duchal, &c. to the late Alexander Porterfield of Porterfield; which being opposed by Mr. Corbet Porterfield, the Sheriff made avizandum to the Court; and their Lordships, in respect that, under the former proceedings, Mr. Corbet Porterfield was held entitled to serve, and that he has in consequence been served, and is infest and in possession of the lands, remitted to the Sheriff to dismiss the brieve.

Feb. 24. 1826.

2d DIVISION.

F.

W. PATRICK, W. S.—A. SWINTON, W. S.—Agents.

JANET ARNOTT, Pursuer.—*Skene—Hay.*

No. 326.

A. THOMSON, Defender.—*Christison.*

*Bastard—Aliment.*—Circumstances in which the father of a natural son was found liable in £6. 6s. per annum of aliment.

THE question here related to the rate of aliment which was to be paid for a natural son. Thomson, the father, stated that he was a servant to a grocer in Dundee, but it was admitted that he was possessed of an heritable property producing a rent of £30, and it was alleged that he was in trade on his own account. The mother was the daughter of a tenant of a small farm, but who, it was stated, was in reduced circumstances. The Lord Ordinary decerned for £8. 8s. of inlying charges, for £7. 7s. as aliment for the first, and £6. 6s. for the subsequent years, until the child should arrive at the age of ten. To this interlocutor the Court adhered so far as regarded the aliment, but modified the inlying charges to £4. 4s.

Feb. 25. 1826.

1st DIVISION.

Lord Meadowbank.

S.

T. LANDALE,—RITCHIE and MILLER,—Agents.

No. 327.

JAMES WILSON, Suspender.—*Shaw.*JOHN HART, Changer.—*Skene.*

*Forgery—Bill-Chamber.*—A bill of suspension of a charge on a bill of exchange passed without caution, on a report by engravers that the bill was forged. The Court refused, as incompetent in the Bill-Chamber, a diligence for recovery of other bills to be compared with that charged on.

Feb. 25. 1826.

2d DIVISION.

Bill-Chamber.

Lord Pitmilly.

F.

In a suspension of a charge on a bill on the allegation of forgery, the Court refused, as incompetent, to grant a diligence in the Bill-Chamber to obtain production of other bills to be compared with that charged on, but remitted to engravers to examine the subscription along with certain documents produced by the suspender bearing his genuine signature, and with that any other bills paid by him, which they ordered him to produce. The engravers having reported that the signature was forged, their Lordships passed the bill without caution.

C. FISHER,—GIBSON-CRAIGS and WARDLAW, W. S.—*Agents.*

No. 328.

J. MORISON, Complainer.—*Sol.-Gen. Hope.*Earl of FIFE, Respondent.—*Rutherford—Duff.*

*Freehold Qualification.*—Held that a freeholder who had conveyed away the liferent, but retained the fee of the superiority of the lands in virtue of which he had been enrolled, is entitled to have new lands added to his original qualification, sufficient of themselves to constitute a new qualification, and thereafter to restrict his original qualification to these lands; and that he does not thereby lose his place in the roll.

Feb. 23. 1826.

1st DIVISION.

Lord Eldon.

S.

THE EARL OF FIFE was originally enrolled as a freeholder in the county of Banff, as in right of the superiority of the lands of Kinnairdy, and his name stood high in the list. He subsequently disposed the liferent to the Rev. Mr. M'Donald, retaining the fee in his own favour. At the last Michaelmas meeting he presented a petition in terms of the 16th Geo. II. c. 11, praying that the freeholders would allow certain parts of the lordship of Balvenny 'to be added to the said lands of Kinnairdy and 'others, on which the petitioner at present stands enrolled, and 'thereafter to restrict the petitioner's qualification as a freeholder 'to the said parts and portions of the lands and lordship of Balvenny.' This was objected to by Morison and others, on the ground chiefly that this was an entire new qualification; and that if his Lordship were to be admitted to the roll, he must be placed at the foot of it. The meeting repelled these objections, granted his Lordship's prayer, and appointed him 'to stand in his present place on the roll.' Morison presented a petition and com-

plaint, which having been remitted to Lord Eldin, his Lordship thereafter reported it on Cases, 'in respect that the cause turns merely on a point of law.' In support of the complaint, Morrison contended,—1. That the claim of Lord Fife was not truly a claim of addition and restriction, but was one in a disguised form for an entirely new enrolment on a new set of lands, and on new titles;—2. That it was not a competent and sufficient claim for the purpose in view, in so far as it was a claim to be put on the roll on lands different from those on which his Lordship was formerly enrolled;—and, 3. That the freeholders did wrong in continuing him on the roll in his former place in the list, after the lands on which he had been enrolled had been withdrawn from his qualification, and when he was placed on the roll on different lands and different titles. On the other hand, it was maintained by Lord Fife,—1. That any freeholder regularly enrolled is entitled to add to his qualification, and also to restrict it, provided the restrictive qualification remain sufficient to entitle him to vote, and that this addition or restriction could not affect his place on the roll;—and, 2. That it would undoubtedly have been competent to have made the addition at one meeting, when he must necessarily have retained his place, and to have restricted the qualification at a subsequent meeting, without being obliged to go to the foot of the roll, and therefore his right to remain in that place could not be affected by the addition and restriction being made at one and the same meeting. The Court dismissed the complaint.

**LORD HERMARD.**—Lord Fife is entitled to remain in his original place. He holds a qualification as far of the lands of Kinnairdy; and his claim is for an addition to that qualification, and thereafter for a restriction. I do not see what harm it could do to grant the prayer of his petition.

**LORD PRESIDENT.**—The fee of Kinnairdy still remains in Lord Fife; and although he has conveyed the liferent to Mr. M'Donald, it does not follow that he must go to the foot of the roll. Suppose that Lord Fife had gone to an election meeting, and had required the freeholders to add the qualification of Balvenny to that of Kinnairdy, they could not have refused to do so; and on this occasion they certainly could not have altered his place on the roll. Then suppose that at a subsequent meeting he had required them to restrict this qualification to the lands of Balvenny, they must have done so without affecting his place on the roll. No doubt this would have been a manoeuvre, but it is one which is consistent with law; and I cannot perceive that the case is altered by his Lordship proceeding in the manner which he has adopted. It is

a mistake by Mr. Wight, who says, at page 155, that 'it is the practice to insert the name of the liferenter and-far in the roll together, beginning with the liferenter, as having the preferable right of voting.' On the contrary, they are often in different places of the roll; and when the vote of the *far* is called for, the preses inquires whether the liferenter be present, and if so, he is entitled to vote.

**LORD CRAIGIE.**—It appears to me that there is no objection to Lord Fife remaining in the place which he holds, even with the addition which has been made to his qualification; but I rather think that where the liferenter of Kinnairdy votes, Lord Fife should not be allowed to vote in the place where he now stands.

**LORD BALGRAY.**—Such an arrangement would lead to inextricable difficulty, and in truth would be placing Lord Fife twice on the roll.

**LORD GILLIES.**—I see nothing to hinder Lord Fife from adding to his claim; and the consequence of restricting it is, not that he shall be struck out and put to the foot of the list, but that he shall remain where he is.

*Complainer's Authorities.*—Dempster, March 2. 1791, (8868); M'Leod, Jan. 17. 1766, (8680); Wight, 284.

*Respondent's Authorities.*—Gordon, Feb. 25. 1808, (8878); Gordon, Jan. 16. 1819, (F. C.)

**J. GORDON, W. S.—INGLIS and WELB, W. S.—Agents.**

No. 329.

**J. CHARLES, Pursuer.—Baird.**

**SOUTH DISTRICT MARKET COMPANY, Defenders.—Brown.**

*Summons—Stat. 6. Geo. IV. c. 120.*—Held competent for a Lord Ordinary, under the above statute, to order a summons containing a great deal of superfluous matter to be amended, by striking out what is superfluous.

Feb. 28. 1826.

2d DIVISION.  
Lord Mackenzie.

**LORD MACKENZIE** reported a summons, extending to 32 printed pages, 28 of which his Lordship considered to be quite superfluous, consisting chiefly of written documents founded on by the party, and quoted at full length, and consulted the Court as to whether he was entitled, under the late act, to dismiss the summons, or to amend it, by striking out the superfluous matter. The pursuer's counsel having offered to amend it in the way suggested by the Lord Ordinary, the Court remitted to his Lordship to allow this to be done.

The Court were unanimous in reprobating such unnecessary amplitude, which they held to be contrary to the spirit and intention of the act of Parliament, and were of opinion that the Lord Ordinary might

competently order summonses of this description to be amended, or even throw them out, if that should seem the most advisable course. Their Lordships stated, that they hoped the expression of the opinion of the Court would prevent the recurrence of such incorrect summonses in future.

J. WATSON, Pursuer.—*Jeffrey—A. McNeill.*

No. 330.

J. YOUNG, Defender.—*D. Macfarlane.*

*Bankrupt—Stat. 1696, c. 5.*—Circumstances in which it was held that a bill granted by a bankrupt, in payment of goods purchased by him, was not liable to be set aside on the act 1696, c. 5.

On the 2d and 9th of August 1825, John Buchanan purchased two separate parcels of oats, each consisting of 50 bolls, from the defender Young, who, on the 12th, gave an order of delivery to Buchanan. The transaction was agreed to be settled by cash, and delivery was not to be made till the price should be paid. This latter part of the agreement, however, was not adhered to, and a partial delivery was given to Buchanan between the 2d and 17th of August. On the last of these days, and before the whole of the oats had been delivered, Young drew out an invoice of the goods, making the sum-total of the price £92. 10s., and giving credit for £91 : 17 : 6 as cash, and 12s. 6d. of discount. Instead of paying cash, Buchanan indorsed a bill at three months from the 17th of August for £56. 10s. in favour of Young, to which the discount, being 11s. 9d., was added; and on the following day he paid £9 in cash, leaving a balance of £26 : 19 : 3 due to Young. The rest of the oats were then delivered to Buchanan, who became bankrupt within sixty days thereafter; and a sequestration of his estates having been awarded, Watson was elected trustee. A reduction was then brought by him of the bill for £56. 10s., on the ground that it had been indorsed in security of a prior debt, seeing that the oats had either been actually delivered, or at least constructively so, before the bill had been indorsed; and that although it had been originally agreed that it should be a cash transaction, yet this had been departed from. In defence it was stated by Young, that this was the only transaction which he had ever had with Buchanan; that the sale was made on condition of cash being paid; but that, at the request of Buchanan, he had taken the bill, which had been represented to him as equivalent to cash; and therefore it was not liable to be set aside as being a security for a prior debt. The Lord Ordinary found, 'That two purchases of grain having been made

March 1. 1826.

1st Division.

Lord Medwyn.

S.

by the bankrupt from the defender, on the 2d and 9th August 1824, to the amount of £92. 10s., delivery was taken of portions of said grain on different days between the 2d and 17th days of the said month of August, on which last day the delivery of the whole was finished: That it is admitted that, at the date of the second sale, an invoice was made out, showing the terms of the bargain, that it was to be a ready money bargain, and that, on payment of cash to the amount of £91 : 17 : 6, allowing 12s. 6d. of discount, the account would be settled: That the bankrupt did not settle the price in terms of the sale; but, on the 17th of August, he indorsed to the defender a bill for £56. 10s. of that date, at ninety days date, and promised to call next day to settle the balance: That on the next day, namely the 18th of August, the bankrupt called, but only paid £9, leaving £26 : 19 : 3 still due to the defender: That sequestration was awarded against the bankrupt on 24th of September thereafter: That it is alleged by the defender that the indorsation of the above bill was in the usual course of trade, and is to be held as equivalent to cash, while this is denied by the pursuer; and that it was taken in this case as cash, and held equivalent to it, seems disproved by the jotting referred to by the defender, where, to the sum of £91 : 17 : 6, which was the amount of the cash payment, which would have settled the transaction, the sum of 11s. 9d. is added, which the Lord Ordinary presumes is the discount of the bill, to make it equivalent to cash; and therefore that the indorsation of the bill in question was an assignment by the bankrupt in favour of a creditor of part of his funds, in prejudice of his other creditors, within sixty days of his bankruptcy, and as such is reducible in terms of the act 1696; and so reduced, decerned, and declared in terms of the libel; but found no expenses due.—The Court, however, altered, and assolizied the defender, with expenses.

**LORD PRESIDENT.**—This is plainly a cash transaction, and does not fall within the statute, and therefore the defender must be assolizied.

The other Judges concurred.

*Pursuer's Authority.*—2 Bell 222.

*Defender's Authorities.*—2 Bell, 225, 227, 229; Stein's *Creditors' Manual* L. 1791, (1142); Thomson, Feb. 28, 1806, (App. No. 5, Bank.)

**C. FISHER, — J. SMITH, W. S. — Agents.**



J. HASTON and Others, Petitioners.—*M'Neill.*

No. 331.

T. CHAPMAN, Respondent.—*Whigham.*

*Separation—Bankrupt.*—Held that a resolution of the commissioners on a sequestrated estate, awarding to a trustee who had been removed from his office a recompense for his trouble, must be brought under the consideration of a general meeting of the creditors, before a complaint to the Court is competent.

March 1. 1826.

1st DIVISION,  
D.

AFTER Chapman had been removed from the office of trustee on the sequestrated estate of Comb, (see ante, Vol. IV. No. 194,) the commissioners found him entitled to £200, as a remuneration for his trouble during the period he was in office. Haston and others, creditors on the estate, thereupon presented a petition, and complaint to the Court, praying 'to find that the commissioners have acted unwarrantably, and have done wrong, in awarding to Mr. Chapman a sum of £200 in name of commission for his trouble; to find that Mr. Chapman is not entitled to more than a reasonable allowance or commission for his trouble, and to modify the same to such sum as to your Lordships shall seem just.' To this complaint Chapman and the commissioners objected, that the decision ought, in the first place, to have been brought under the consideration of a general meeting of the creditors; and that it was incompetent, or at least premature, to bring it before the Court in the first place. The Court sustained the objection, and dismissed the petition as premature.

A. JOHNSTON, W. S.—

—Agents.

G. M'FARLANE, Pursuer.—*Houston.*

No. 332.

J. M'NEE, Defender.—*Forsyth.*

*Proving the Tenor.*—Circumstances in which the Court refused, hoc statu, to allow a proving of the tenor of a bill of exchange.

March 1. 1826.

2d DIVISION.  
Lord Cringliffe.  
M'K.

M'FARLANE having raised a summons of proving of the tenor of a bill of exchange, said to have been accepted by M'Nee, the Court appointed him to lodge a condescendence of the facts he offered to prove, in which the *casus amissionis* was stated to be, that he had transmitted the bill to his agent in Glasgow, who was carrying on some proceedings for his behoof before the Commissary Court there; that he had placed it among the papers in that proceeding, although it did not form part of the process, and was not marked in the inventory; that these papers were borrowed by Harvie, the agent for M'Nee, with the bill among them, and that it had never since appeared, notwithstanding the strictest

search. The Court dismissed the action *hoc statu*, reserving to the pursuer his recourse against Harvie.

The Court, while they thought that there might be cases where a proving of the tenor of a bill of exchange ought to be allowed, were of opinion that it was a matter of great delicacy, and should not be permitted except on strong grounds.

R. BURN, W. S.—

—Agents.

No. 333.

A. FORRESTER, Pursuer.—*Burnett*.  
HIS CREDITORS, Defenders.—*A. McNeill*.

*Cessio Bonorum*.—Process of *cessio bonorum* dismissed, on the ground that the pursuer, after having been liberated on a sick bill, left the jurisdiction of the Magistrates of the burgh, and that the medical certificate did not bear to be ‘on soul and conscience.’

March 1. 1826.

2d Division.

IN a process of *cessio bonorum*, raised by Forrester, who had been liberated from Edinburgh gaol on a sick bill, after having been imprisoned three days, the Court appointed him to lodge a minute, ‘stating the circumstances of his incarceration, and subsequent liberation.’ He accordingly gave in a minute, accompanied with a certificate from a physician, that his life was in danger from confinement. But it appearing from the minute that he had left Edinburgh after his liberation, so as to be beyond the bounds of the Magistrates’ jurisdiction, and the certificate not being certified ‘on soul and conscience,’ the Court dismissed the process.

J. M’Cook, W. S.—

—Agents.

No. 334.

J. HEGGIE and COMPANY, Pursuers.—*Moncrieff*—*Boswell*.  
STARK and SELKRIG, Defenders.—*Skene*—*Shaw*.

*Process—Summons—Expenses*.—Expenses of process may be awarded in favour of a pursuer, though not concluded for in his summons.

March 1. 1826.

2d Division.

Lord Medwyn.

B.

AFTER judgment in this reduction had been pronounced in favour of the pursuers, as mentioned ante, Vol. III. No. 342, they craved to have expenses of process awarded them. This having been objected to on the part of the defenders, on the ground that the summons contained no conclusion for expenses, the Court remitted to the Lord Ordinary to hear parties as to this point. His Lordship requested a report as to the recent practice in regard to summonses of reduction of decrees, and particularly of decrees arbitral, from the Deputy-keeper and Commissioners of the Signet, who reported that it is the proper and general prac-

'tice to insert a conclusion for expenses' in libelling such summonses. The Lord Ordinary having thereupon appointed minutes, with which he made avizandum to the Court, their Lordships unanimously repelled the objection, and found the pursuers entitled to expenses.

**LORD PITMILLY.**—This is an important point in practice, and I am now satisfied, contrary to my first impression, that it is not necessary to conclude for expenses. I at first thought that the general rule applicable to the merits of the cause, viz. that a pursuer cannot obtain any thing which he does not ask for, applied also to the matter of expenses, and on this view I acted in the case of *Auchtermuchty*, which was decided in the Outer House on a short debate merely at the Bar; but I am now convinced that there is a clear distinction as to this point between the merits and the question of expenses, and that the rule does not apply to the latter. The practice of inserting a conclusion for expenses is not unvaried, nor of a very old date; and the acts of Parliament are very decisive, especially the statute 1592, which is the foundation of the power to award expenses to a defender, and the words of which are as strong in regard to pursuers as to defenders. I am therefore satisfied that expenses may be given, though not concluded for in the summons.

**LORD ROBERTSON.**—I entertain the same opinion. There is a great difference between the conclusion on the merits, and that for expenses. As to the merits, the Judge has no power except as craved; and it is as necessary that there should be conclusions, as that there should be a party. But the expenses are a mere accident of the process. It is *pari judicio* to award expenses, when the pleas or conduct of the party require it, as a sort of punishment to prevent vexatious and calumnious processes.

**LORD GLENLE.**—The report of the Deputy-keeper and Commissioners does not affect the question; for, whatever may be the case now, there was never a conclusion for expenses in our older practice, though they were constantly awarded. The claim for expenses is not, in fact, in existence at the date of the summons—it only emerges in the course of the process, by the adversary conducting himself in such a way as to subject himself in expenses; and in many classes of actions, as proving of the tenor, forthcoming, cessio, &c. where resistance is not anticipated, it is not usual to conclude for expenses, although these are still awarded if an improper resistance be made, as was done the other day in a case of cessio, in regard to the expense of a proof, in which the opposing creditors failed to establish their averments. I should doubt, however, if, when there is no conclusion for expenses, a party could take a decree in absence, including them.

**LORD ALLOWAY** concurred.—Our rule as to expenses has been adopted from the Roman law, and by our common law, therefore, expenses may be given to a pursuer, though not concluded for. Our statutes also are stronger and more distinct than the English statute of Gloucester, under authority of which the courts of law in England award expenses, though not concluded for.

**LORD JUSTICE-CLERK**.—I was struck with this circumstance in regard to the practice in England, that the Court of Chancery there awards expenses, though not asked, independent of statute altogether; and our powers as a Court of Equity equally entitle us to do so. Looking at the principles of our law as derived from the Roman, and at our acts of Parliament, it is impossible to doubt that expenses may be awarded to both defenders or pursuers, though there be no conclusion to that effect.

*Pursuers' Authorities*.—Voet, 42. 1. 21; Vinn. 4. 16; Reg. Maj. 3. 26. 3; Balfour's Pract. p. 290—314—5—6; 2. M'Kenzie, 495; 1471. c. 49; 1557, c. 64; 1587, c. 42; 1592, c. 142; Art. of Regal. Nov. 2. 1695, § 28; A. S. Nov. 20. 1711, § 14. and Jan. 1. 1726, § 7; Dallas's Styles, p. 186; 7. 4. Bank. 36. 5; Blackstone, 3. 24; Stephen on Pleading, § 7—44; Bohan's Curran Cancell. 41—63; Turner and Venable's Practice in Chancery, p. 4—7; 6. Edw. I. c. 1.

*Defenders' Authorities*.—Voet, 42. 1. 19, and 2. 12. 9; Wisenbec. 2. 58. 8; Vinn. 4. 16; 2. Huber, 459; Perezus, p. 645; Pothier, 2. 12; Reg. Maj. 3. 26. and Baron Courts, c. 20; Balfour, p. 315—6. and 290; 2. M'Kenzie, 498; 4. Edw. I. 3. 4; Quon. Attach. c. 71. 54. and 80; Stat. Ro. L. c. 12. and 15; Spottiswoode's Pract. 20; 1592, c. 142; M'Kenzie's Observ. on 1579, c. 91; 1587, c. 42; and 1585, c. 13; 1. Dallas, p. 27; Juridical Styles; 6. Bell on Deeds, p. 232 et seq.; Gardiner v. Bailies of Auchtermuchty, 1819, (Lord Pitmilny); Johnston, July 9. 1824, (Lord Eldin); Tidd on Costs, p. 2.

**J. MACANDEW, — J. DONALDSON, — Agents.**

No. 335.

**D. GORDON, Pursuer. — A. Bell.**

**M. HYSLOP and COMPANY, Defenders. — M'Neill.**

*Process — Summons — Expenses*.—Competent to award expenses to pursuer, to a greater amount than concluded for in the summons.

March 1. 1826.

2d Division.  
M'K.

THIS case differed from the preceding in the circumstance, that the summons contained a conclusion for 'the sum of £200 sterling, as the expense of process, and of extracting the decree to follow hereon.' But the expenses amounted to a much larger sum, and the defenders maintained that the pursuer was not entitled to more than the amount to which he had limited his demand in his summons. The Court unanimously repelled the objection.

**VANS HATHORN, W. S. — J. THOMSON, — Agents.**

GEORGE COMB, Petitioner.—*Whigham.*

T. CHAPMAN, Respondent.—*Forsyth—Cockburn.*

*Sequestration—Contingent Debt.*—Question raised, but not decided, as to the rate at which the wife of a bankrupt was to be ranked, who had right to an annuity of £200 on her surviving him, and to be restricted to £100 in the event of her second marriage.

March 2. 1826.

1st DIVISION.  
D.

COMB, by his contract of marriage, bound himself to provide his wife, in case she should survive him, a yearly annuity of £200 sterling, to be restricted to £100 in the event of her entering into a second marriage. Having become bankrupt, and his estates having been sequestered, and Chapman appointed trustee, a claim was lodged on behalf of Mrs. Comb for £3515: 9: 8 as the value of her annuity, she being at this time 27, and her husband 34 years of age. In an application by Comb for approval of a composition, which he alleged was acceded to by creditors in value to the extent required by the statute, Chapman gave in a report, stating that there was not the requisite concurrence, and in particular he ranked the claim of Mrs. Comb (who was an acceding creditor) at only £1000, which he alleged was more than the value of the annuity allowed by insurance offices in a case which depended on the contingency of her surviving her husband, and of its being subsequently restricted in the event of a second marriage. To this it was answered, that, in terms of the statute, she was entitled to be ranked for the value of the annuity as at the present moment, and as if her husband were dead, in which case it would require the sum for which she claimed to purchase an annuity of £200, and that she was entitled to that annuity, even although her husband died under circumstances against which no insurance could be effected, and therefore the calculation of an insurance office could not form a correct guide. In addition to this objection, Chapman alleged that the debts of various other creditors ought not to be counted; and the Court, without pronouncing any express judgment in the question with Mrs. Comb, found that there was not the requisite concurrence, and therefore refused the petition.

THE LORDS PRESIDENT and GILLIES thought the principle on which the trustee proposed to rank Mrs. Comb was incorrect, and that she was entitled to be ranked for such a sum as would purchase to her an annuity, supposing the contingencies had arrived.

LORD HERMANN was of a different opinion, and thought that the ranking by the trustee was correct.

LORD CRAIGIE was desirous, before judgment should be pronounced, to ascertain what the annuity would bring at a public sale.

A. JOHNSTON, W. S.—A. GOLDIE, W. S.—Agents.

No. 337.

J. MEGGET, Pursuer.—*Brownlee*.  
G. DOUGLAS, Defender.—*Matheson*.

*Law-Agent's Account*.—Held that acceptance and payment of a bill drawn by a law-agent on his client, peddling a process, in payment of his account to that date, does not preclude the accounts being audited.

March 2, 1826.

2d Division.

Lord Mackenzie.

B.

MEGGET, W. S., was employed by Douglas to conduct a process before this Court. He received several payments to account in the course of the process, and in the beginning of 1824 he transmitted an account up to that date, and drew on Douglas for the balance as then brought out by him, by a bill which Douglas accepted and paid. The process was still carried on; but Megget, having in 1825 given up the agency, raised an action for his account subsequently incurred against Douglas, who pleaded in defence, that his remittances were more than sufficient to pay the whole accounts, if made out according to the regulations of Court. The Lord Ordinary remitted the accounts sued for to the auditor, and, 'before further answer,' appointed 'the pursuer to produce his whole other accounts against the defender.' Against this interlocutor Megget reclaimed, on the ground that prior to that now sued for had been finally settled; and that the payment of the balance then due, and that they could opened up. The Court unanimously refused his reclaim.

T. MEGGET, W. S.—Jos. GORDON, W. S.—Agre

No. 338.

W. ROSS, Pursuer.—*Jeffrey—Jameson—A.*  
Rev. W. FINDLATER and Others, Defenders.—*S.*  
—*Moncreiff—A. Connell*.

*Jurisdiction*.—Stat. 43. Geo. III. c. 54.—*Schoolmaster*.—Held, 1. of Session has jurisdiction to set aside the decree of a presbytery re-muster, when they do not comply with the requisites of the above act. It is a sufficient deviation from the statute to warrant the interference that in a serious charge they have not served him with a libel; it proceeded without a regular complaint,—and that the confession of the presbytery bears to have proceeded, was not signed &c. —That having acknowledged him as schoolmaster, and removed him as such, the presbytery cannot object to his title that he was not regularly inducted into the office originally.

March 2, 1826.

2d Division.

Lord Eldon.

F.

THE presbytery of Tongue, at a meeting in September 1822, having taken into their consideration (as the minutes of the meeting bore) 'a report circulated through the bounds of the presbytery,' that Ross, who had exercised the 'office of schoolmaster of the parish of Durrness for eleven years, had obtained the pa-

' parochial certificate, which it is incumbent on every individual who  
 ' is enrolled as a student of divinity to produce, in a very objectionable manner,' directed their clerk to make some inquiry into the matter, and resolved to meet at Durness on the 11th November following, to take it into further consideration. They accordingly held a meeting on that day, the minutes of which bore, that ' it appears to the presbytery that there must be an irregularity in Mr. William Ross's conduct, as to the manner in which  
 ' he obtained said certificate ;' and they ' therefore appointed to  
 ' meet at Durness on the 13th of this month, to inquire into Mr.  
 ' Ross's conduct in this affair, and to take such steps as may then  
 ' appear proper to be adopted.' The minutes contained no appointment to intimate to Mr. Ross the intended meeting and its object, or what had already taken place in reference to him; and it was alleged that no such intimation had been given him. On the other hand, the presbytery averred that such intimation had been given, but they admitted that no libel or charge had been served on him. Agreeably to appointment, the presbytery met on the 13th, and called Ross before them, and the minute bore, that he ' being questioned how he obtained the parochial certificate, &c. acknowledged that his parish minister having issued him such certificate, he applied repeatedly to Mr. John Kenzie, minister of Edrachilles, for one; but that Mr. M'Kenzie having refused to grant it, he thereupon applied to his brother George Ross, schoolmaster at Edrachilles, whom he (Mr. William Ross) reports as being frequently employed by Mr. Kenzie to sign for him, and that his brother had written a certificate for him, signed ' John M'Kenzie,' &c. by means of which certificate, presented to the professor of divinity, he got himself enrolled at the hall.' The presbytery found him guilty of his confession,—deposed him ' instantan ab officio schoolmaster of Durness,' and appointed their sentence to be read from the pulpit the next Sunday. The confession on which this sentence proceeded was not signed by Ross, who admitted that he had made any such admission as appeared on the minutes; and having been ejected by a warrant from the Sheriff, founded on an application by Findlater, founded on the act 48. Geo. III. c. 54, he raised an action of reduction of the decree of the presbytery, and of the Sheriff's warrant founded on it, concluding likewise for damages, and to have it found that he was not duly removed from his office, and was entitled to be immediately reinstated, on the ground that the presbytery had transgressed the act 48. Geo. III. c. 54, in having proceeded without any regular charge being presented, in not having served him with

No. 337.

J. MEGGET, Pursuer.—*Brownlee*.  
G. DOUGLAS, Defender.—*Matheson*.

*Law-Agent's Account*.—Held that acceptance and payment of a bill drawn by a law-agent on his client, pending a process, in payment of his account to that date, does not preclude the accounts being audited.

March 2. 1826.

2d Division.

Lord Mackenzie.

zie.

B.

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T. MEGGET, W. S.—Jos. GORDON, W. S.—Agents.

No. 338.

W. ROSS, Pursuer.—*Jeffrey—Jameson—A. Wood*.  
Rev. W. FINDLATES and Others, Defenders.—*Sol. Gen. Hope*  
—*Moncreiff—A. Connell*.

*Jurisdiction*.—Stat. 43. Geo. III. c. 54.—*Schoolmaster*.—Held,—1.—That the Court of Session has jurisdiction to set aside the decree of a presbytery removing a schoolmaster, when they do not comply with the requisites of the above statute.—2.—That it is a sufficient deviation from the statute to warrant the interference of the Court, that in a serious charge they have not served him with a libel; that they have proceeded without a regular complaint,—and that the confession on which the decree of the presbytery bears to have proceeded, was not signed by him;—and,—3.—That having acknowledged him as schoolmaster, and removed him specially as such, the presbytery cannot object to his title that he was not regularly inducted into the office originally.

March 2. 1826.

2d Division.

Lord Eldon.

F.

THE presbytery of Tongue, at a meeting in September 1822, having taken into their consideration (as the minutes of the meeting bore) 'a report circulated through the bounds of the presbytery,' that Ross, who had exercised the 'office of schoolmaster of the parish of Durness for eleven years, had obtained the pa-



‘parochial certificate, which it is incumbent on every individual who is enrolled as a student of divinity to produce, in a very objectionable manner,’ directed their clerk to make some inquiry into the matter, and resolved to meet at Durness on the 11th November following, to take it into further consideration. They accordingly held a meeting on that day, the minutes of which bore, that ‘it appears to the presbytery that there must be an irregularity in Mr. William Ross’s conduct, as to the manner in which he obtained said certificate;’ and they ‘therefore appointed to meet at Durness on the 13th of this month, to inquire into Mr. Ross’s conduct in this affair, and to take such steps as may then appear proper to be adopted.’ The minutes contained no appointment to intimate to Mr. Ross the intended meeting and its object, or what had already taken place in reference to him; and it was alleged that no such intimation had been given him. On the other hand, the presbytery averred that such intimation had been given, but they admitted that no libel or charge had been served on him. Agreeably to appointment, the presbytery met on the 13th, and called Ross before them, and the minute bore, that he ‘being questioned how he obtained the parochial certificate, &c. acknowledged that his parish minister having refused him such certificate, he applied repeatedly to Mr. John M’Kenzie, minister of Edrachilles, for one; but that Mr. M’Kenzie having refused to grant it, he thereupon applied to his brother Mr. George Ross, schoolmaster at Edrachilles, whom he (Mr. William Ross) reports as being frequently employed by Mr. M’Kenzie to sign for him; and that his brother had written a certificate for him, signed ‘John M’Kenzie,’ &c. by means of which certificate, presented to the professor of divinity, he got himself enrolled at the hall.’ The presbytery found him guilty ‘in terms of his confession,’—deposed him ‘instantly ab officio’ as schoolmaster of Durness, and appointed their sentence to be intimated from the pulpit the next Sunday. The confession on which this sentence proceeded was not signed by Ross, who denied that he had made any such admission as appeared on the minutes; and having been ejected by a warrant from the Sheriff, proceeding on an application by Findlater, founded on the act 43. Geo. III. c. 54, he raised an action of reduction of the decree of the presbytery, and of the Sheriff’s warrant founded on it, concluding likewise for damages, and to have it found that he was not duly removed from his office, and was entitled to be immediately reinstated, on the ground that the presbytery had transgressed the act 43. Geo. III. c. 54. in having proceeded without any regular charge being presented, in not having served him with

No. 337.

J. MEGGET, Pursuer.—*Brownlee*.  
G. DOUGLAS, Defender.—*Matheson*.

*Law-Agent's Account*.—Held that acceptance and payment of a bill drawn by a law-agent on his client, pending a process, in payment of his account to that date, does not preclude the accounts being audited.

March 2. 1826.

2d Division.

Lord Macken-

zie.

B.

MEGGET, W. S., was employed by Douglas to conduct a process before this Court. He received several payments to account in the course of the process, and in the beginning of 1824 he transmitted an account up to that date, and drew on Douglas for the balance as then brought out by him, by a bill which Douglas accepted and paid. The process was still carried on; but Megget, having in 1825 given up the agency, raised an action for his account subsequently incurred against Douglas, who pleaded in defence, that his remittances were more than sufficient to pay the whole accounts, if made out according to the regulations of Court. The Lord Ordinary remitted the accounts sued for to the auditor, and, 'before further answer,' appointed 'the pursuer to produce his whole other accounts against the defender.' Against this interlocutor Megget reclaimed, on the ground that his accounts prior to that now sued for had been finally settled by the payment of the balance then due, and that they could not be now opened up. The Court unanimously refused his reclaiming note.

T. MEGGET, W. S.—Jos. GORDON, W. S.—Agents.

No. 338.

W. ROSS, Pursuer.—*Jeffrey—Jameson—A. Wood*.  
Rev. W. FINDLATER and Others, Defenders.—*Sol. Gen. Hope*  
—*Moncreiff—A. Connell*.

*Jurisdiction*.—Stat. 43. Geo. III. c. 54.—*Schoolmaster*.—Held,—1.—That the Court of Session has jurisdiction to set aside the decree of a presbytery removing a schoolmaster, when they do not comply with the requisites of the above statute.—2.—That it is a sufficient deviation from the statute to warrant the interference of the Court, that in a serious charge they have not served him with a libel; that they have proceeded without a regular complaint,—and that the confession on which the decree of the presbytery bears to have proceeded, was not signed by him;—and,—3.—That having acknowledged him as schoolmaster, and removed him specially as such, the presbytery cannot object to his title that he was not regularly inducted into the office originally.

March 2. 1826.

2d Division.

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2d Division.

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No. 338.

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March 2. 1826.

2d Division.

Lord Eldon.

F.

THE presbytery of Tongue, at a meeting in September 1822, having taken into their consideration (as the minutes of the meeting bore) 'a report circulated through the bounds of the presbytery,' that Ross, who had exercised the 'office of schoolmaster of the parish of Durrness for eleven years, had obtained the pa-

'rochial certificate, which it is incumbent on every individual who is enrolled as a student of divinity to produce, in a very objectionable manner,' directed their clerk to make some inquiry into the matter, and resolved to meet at Durness on the 11th November following, to take it into further consideration. They accordingly held a meeting on that day, the minutes of which bore, that 'it appears to the presbytery that there must be an irregularity in Mr. William Ross's conduct, as to the manner in which he obtained said certificate;' and they 'therefore appointed to meet at Durness on the 13th of this month, to inquire into Mr. Ross's conduct in this affair, and to take such steps as may then appear proper to be adopted.' The minutes contained no appointment to intimate to Mr. Ross the intended meeting and its object, or what had already taken place in reference to him; and it was alleged that no such intimation had been given him. On the other hand, the presbytery averred that such intimation had been given, but they admitted that no libel or charge had been served on him. Agreeably to appointment, the presbytery met on the 13th, and called Ross before them, and the minute bore, that he 'being questioned how he obtained the parochial certificate, &c. acknowledged that his parish minister having refused him such certificate, he applied repeatedly to Mr. John M'Kenzie, minister of Edrachilles, for one; but that Mr. M'Kenzie having refused to grant it, he thereupon applied to his brother Mr. George Ross, schoolmaster at Edrachilles, whom he (Mr. William Ross) reports as being frequently employed by Mr. M'Kenzie to sign for him, and that his brother had written a certificate for him, signed 'John M'Kenzie,' &c. by means of which certificate, presented to the professor of divinity, he got himself enrolled at the hall.' The presbytery found him guilty 'in terms of his confession,'—deposed him 'instantly ab officio as schoolmaster of Durness,' and appointed their sentence to be intimated from the pulpit the next Sunday. The confession on which this sentence proceeded was not signed by Ross, who denied that he had made any such admission as appeared on the minutes; and having been ejected by a warrant from the Sheriff, proceeding on an application by Findlater, founded on the act 43. Geo. III. c. 54, he raised an action of reduction of the decree of the presbytery, and of the Sheriff's warrant founded on it, concluding likewise for damages, and to have it found that he was not duly removed from his office, and was entitled to be immediately reinstated, on the ground that the presbytery had transgressed the act 43. Geo. III. c. 54. in having proceeded without any regular charge being presented, in not having served him with

a libel, or given him any notice of the charge, and in pronouncing without proof the sentence of deposition. In defence it was pleaded, —1. That Ross had no title to pursue, as he had not been regularly inducted into the office, and in fact had never been parish schoolmaster of Durness.—2. That the action was incompetent in this Court, on the same grounds as were pleaded in the case of Brown, ante, Vol. III. No. 337, and Vol. IV. No. 150; and,—3. That it was not imperative on presbyteries, by the 43. Geo. III.; to serve the schoolmaster with a libel, but they were entitled to exercise their discretion in this matter, and that the minutes were sufficient evidence of the confession, though not signed by the party. The Lord Ordinary reduced and declared ‘in terms of the reductive conclusions of the libel, and of the conclusion that the pursuer was not duly removed from his office, but that he is entitled to the enjoyment thereof, and to be put into immediate possession of the same;’ and the Court, ‘in respect that the proceedings of the presbytery were not warranted by the statute of the 43. Geo. III., adhere to the interlocutor of the Lord Ordinary in so far as it reduces, decerns, and declares in terms of the reductive conclusions of the summons, and found that the pursuer was not duly removed from his office, and is entitled to be restored to the same situation in which he stood previous to the 18th November 1822; reserving to the Ordinary to hear as to the other conclusions of the libel, and to do there-in as he shall see cause.’

**LORD ROBERTSON.**—Before considering the merits, it is necessary to dispose of the preliminary objection to the title of the pursuer. He states in his summons that he was duly appointed schoolmaster, and that he has been illegally removed; but I entertain very great doubts if he is entitled to the status which he claims, as none of the requisites of the statute regarding his election have been complied with. He has no doubt been in possession since June 1811, but that cannot validate an irregular election; and if he is not entitled to the character of parish schoolmaster, I do not think he can pursue this action. On this point I must notice a decision in 1797, which, however, is not reported. One Penny was schoolmaster in Perth, but had no regular election, and merely did the duty, and received the emoluments of parish schoolmaster. The heritors called a meeting, removed and ejected him. He complained by advocacy, but his bill was refused by Lord Monboddo; and the Court unanimously refused a reclaiming petition—all the Judges being clear that he was removable at pleasure. On the merits of this case, the question involved in it is of great importance. This Court has undoubtedly a supreme jurisdiction

to review all proceedings in matters altogether civil. But it has no such power in causes purely ecclesiastical. In regard to schoolmasters, they are declared by the act 1693 to be subject to presbyteries; and this act is merely declaratory of the law of the church. The question as to this Court's jurisdiction in regard to schoolmasters underwent a very full discussion in the case of Bothwell; and the House of Lords finally determined that the Court had no jurisdiction. It may therefore be assumed that this Court possesses no radical jurisdiction in questions of this nature. What, then, was the effect of the 43. Geo. III. which declares that the sentence of the presbytery 'shall be final without appeal to, or review by any court, civil or ecclesiastical?' Did it confer a new jurisdiction which undoubtedly was not previously possessed? I apprehend that it did not. On the contrary, it expressly excluded any power of review by this Court. It is said that when an inferior court exceeds its powers, this Court can interfere, as in regard to the provisions of road acts, although their jurisdiction be excluded. But this can only hold in regard to matters of civil right falling under the radical jurisdiction of the Court. The act 45. Geo. III. secures from review the judgment of presbyteries in regard to schoolmasters, if they comply with the provisions of the statute. But if they disregard these provisions, the consequence ought merely to be, that they forfeit the protection of the act securing their judgment from review, and leave it subject to the same review which might have been exercised before the passing of the act; but this was a review by the supreme Ecclesiastical Court, and not by the Court of Session. I do not think that an excess of power on the part of the presbytery has been made out; but, at any rate, I do not consider that this Court is entitled to interfere.

LORD GLENKLE, at a previous advising, when memorials were ordered, expressed an opinion on the point of jurisdiction coinciding with the preceding. His Lordship now observed—I have again considered this case as attentively as I could, and my opinion coincides very much with that of the Lord President in the case of Brown v. Heritors of Kilberry. The decree of a presbytery removing a schoolmaster, in order to warrant the interference of the civil power to carry it into effect, must be in the situation mentioned in the statute; and if it is not so, we are bound to set it aside, but only *ad civilem effectum*. If, however, we are entitled to do so, we must entertain the reduction. If the presbytery in this case, instead of deposing, had inflicted a censure, it might have happened that their judgment would not have been under the protection of the act; but still we could not have interfered to give redress—this must have been left to the Court within whose radical jurisdiction the matter falls. And so

Lord Balgray states as to punishment awarded by a court-martial, that the Court of Justiciary might interfere ; but he does not say that the Court of Session could do so. It can therefore be only *ad civilem effectum* that we have power to set aside a decree of a presbytery, merely in so far as it is a warrant for the Sheriff's decree of ejection. But to this extent we may set aside the presbytery's judgment, and the decree of the Sheriff proceeding on it, if the presbytery have transgressed the statute. And in regard to this point, I am satisfied that they have done so. *Ex facie* of the sentence itself, it is not in terms of the statute. It implies that there was no complaint at all. The presbytery, however, cannot do any thing without a complaint, to the effect of their proceedings forming a warrant for a decree of ejection. As to finding that this man is entitled to all the privileges of parish schoolmaster, I have great doubts ; but I do not think that the circumstance of his not being truly schoolmaster interferes with his right to set aside the sentence, and I think therefore that it ought to be reduced, so far as it is a warrant for the Sheriff's decree, but I would leave it untouched in other respects.

**LORD PITMLLY.**—I have been confirmed in my opinion by the decision in the case of Brown, which is a much stronger case than this. The only thing amiss there was the not taking the proof in writing. Here, however, there was no complaint, no libel, and no proof. The confession is denied, and it is no way authenticated. Confession, no doubt, is the best of all evidence ; but the libel should be read over, and the party asked if he admits it or not ;—it should then be signed and authenticated by the Judge. Nothing of that was done here ; and I cannot figure any thing more completely irregular. There must be a control to correct such proceedings. Where, then, does it lie ? Is it to lie in the Ecclesiastical Courts ? They are expressly excluded by the statute, and cannot interfere ; and they have not that *nobile officium* which must exist somewhere to remedy wrong. The power required to redress wrongs of this nature is not a power to review, but to quash irregular proceedings contrary to statute. Now, ecclesiastical courts can have no such power. If, then, they have not this power, and as it must exist somewhere, it is clear that it must be possessed by this Court, and accordingly it has exercised the power of review in many cases where it has been excluded. The principle is obvious—presbyteries have no jurisdiction beyond what the statute gives. If they go beyond it, they act without jurisdiction ; and in all such cases, although this Court has no original jurisdiction in the matter, they must have power to interfere, not to review, but to set aside irregular and illegal proceedings. As to the objections to the pursuer's title, the presbytery are not entitled to plead it. They have acknowledged him as a schoolmaster for eleven years—they



have deposed him as such ; and they rest the application to the Sheriff on the act of Parliament.

**LORD ALLOWAY.**—I entirely concur with the opinion last delivered. There are three judgments of the Court fixing this point ; but, even were it open, there are, on principle, the clearest grounds for supporting the decisions. As to the pursuer's title, after such possession, we cannot presume that he is not a schoolmaster, especially when the presbytery themselves try and depose him as such. A distinction has been stated by Lord Glenlee between the cases where this Court has original jurisdiction, (such as those under the small debt act,) and those where the Court has no original jurisdiction. In those of the first class, if the act of Parliament, excluding the jurisdiction of this Court, be not followed out exactly, the jurisdiction remains the same as formerly. And even where there is no radical jurisdiction, if wrong is done contrary to law, or to a statute giving power to inferior courts, this Court, by its super-eminent jurisdiction, has a power to remedy ; as, for instance, in regard to road-trustees and matters of lieutenancy, this Court could still interfere ; and if ever there was a case where an inferior court has gone wrong, the presbytery have done so here. By the new statute they have powers never before possessed by them, and no appeal lies to any Court, provided they keep within the statute ; but if they pass it, they come into the same situation with any other Judge created by statute.

**LORD JUSTICE-CLEER.**—I cannot say that this question is free from difficulty. The case of Bothwell undoubtedly fixes that proceedings as to schoolmasters rest with the Church Courts, and that this Court has no power of review in such questions. But neither the judgment in the case of Bothwell, nor the terms of the statute 43d Geo. III., interfere with the principles on which we propose to decide here. It is necessary first to consider the pursuer's title ; and I must own that where Judges have given judgment against a party as in a particular capacity, I cannot allow them to say that he has not that character. Independent of the evidence of documents, in which they acknowledge him as schoolmaster, the words of their own decree are sufficient. They proceed against him as schoolmaster—they depose him as such, and apply, under the 43d Geo. III., for warrant of ejection from the Sheriff. I have no doubt, therefore, as to the title. In regard to the merits, if a presbytery follow exactly the act of Parliament, this Court never can interfere. But they have not done so here. It is said that it is discretionary on their part to serve the schoolmaster with a libel ; but the meaning of the statute appears to me to be, that if the charge be of that important nature which will lead to deposition, he shall be served with a libel. A code is laid down as a form of process, which the presbytery must conform to. But here there was no

complaint; the presbytery merely took 'into their consideration a report current through the bounds.' There was nothing more than a report. The party was not regularly cited, and then he was interrogated under trial. It is said he acknowledged the charge against him, but this is positively denied. He never signed, nor was required to sign, his confession; and I cannot hold this to be the necessary proof required by the statute. There has been manifest excess of power, and this, as the Supreme Civil Court, is bound to redress all the wrongs of the lieges, and to keep all inferior jurisdictions within the law. We are entitled to quash the proceedings of the presbytery, but without interfering on the merits of the question. As to the competency of an appeal to the General Assembly, did not the presbytery apply to the Sheriff, and get a decrees of ejection, and could the General Assembly touch that? They undoubtedly could not;—it is therefore demonstrable, that it is to this Court the application must be made. In cases under the revenue laws, if Justices of the Peace go beyond their power, this Court would interfere; and there are several other illustrations of the same principle. We are not trenching on the ecclesiastical functions of any Court, but proceed on the grounds stated by the Lord President in the cases of Corstorphine and Brown.

For authorities, see *Brown v. Heritors of Kilberry*, Nov. 15. 1825, ante, Vol. IV. No. 150.

J. M'DONELL, W. S.—MURRAY and INGLIS, W. S.—Agents.

No. 339.

N. M'CANDY, Advocate.—*Sol.-Gen. Hope—Marshall.*  
ANN TURPY, Respondent.—*Cunninghame—Shaw.*

*Seduction—Reparation.*—Circumstances under which a person, who by his conduct had created a belief that he was intending marriage, and seduced the woman, was found liable in damages.

March 3. 1826.  
1st Division.  
Bill-Chamber.  
Lord Medwyn.

ANN TURPY brought an action before the Commissaries against M'Candy, a student of medicine, stating that, during her residence with her uncle, an innkeeper in Edinburgh, she became acquainted with M'Candy, who 'shortly thereafter, and more particularly throughout the greater part of the year 1821, paid his assiduous addresses to the complainer, professing the greatest love and affection for her, with an intention and promise to marry her:—that, accordingly, on a certain day in November 1821, a private marriage had taken place, and she had admitted him to the privileges of a husband,—and that their intercourse continued for two years thereafter, when a child was born, and he had deserted her. She therefore concluded to have it found that they were married persons; or otherwise, if she should fail in

establishing a marriage, that 'the said Nicholas M'Candy, defender, ought and should be decerned to make payment to the complainer of the sum of £500 sterling nomine damni, on account of his whole conduct towards the complainer, in having seduced and imposed upon her, and thereby made her yield to his embraces, as before libelled.' The allegation as to the marriage was negatived on a reference to the oath of M'Candy, and a proof was thereupon allowed of that of seduction. From the evidence it appeared that the parties had first become acquainted in 1819, at which time Turpy was residing with her uncle and aunt, who were people of respectability, and that she was equally so; that M'Candy had shown her the most assiduous attentions, and had been received and entertained as one of the family; that he created an impression upon all the relations and friends that he was courting her in marriage, and repeatedly expressed himself to that effect in her presence; that, on the death of her aunt, he put himself into mourning, and attended the funeral as one of the family, and that he continued in this line of conduct until after the death of the uncle, and a child had been born, of which he admitted that he was the father. The Commissaries found 'the defender liable to the pursuer in damages for seduction,' and awarded £300.

Against this judgment M'Candy presented a bill of advocacy, in which he contended that, to constitute seduction, it was necessary that the woman should prove, not merely that she had surrendered her person, and had received marks of attention, but that the illicit intercourse had been occasioned by the man having practised such treacherous devices as were calculated to eradicate virtuous principles from the bosom of a modest and pure-minded woman; that in this case no such evidence had been produced; and besides, that all the proof had reference to his conduct subsequent to the period of seduction, and therefore could not competently be founded on. To this it was answered, that the doctrine contended for by M'Candy was contrary to the law of Scotland; that it was sufficient to constitute seduction, that the virtue of the woman had been overcome by false pretences; that in this case he had impressed upon her mind that his intentions were honourable, and that he had taken advantage of that impression to deprive her of her virtue, so that he had been guilty of a stuprum fraudulentum. The Lord Ordinary having reported the bill, the Court unanimously refused it, and found expenses due.

**LORD HERMAND.**—The doctrine maintained by the advocator is not only contrary to the law of Scotland, but is contrary to every moral

principle. His conduct here has been most disgraceful. He did every thing in his power to gain the affections of this young woman; and taking advantage of her weakness, and of the influence which he had gained over her, he deprived her of her virtue, and yet he says that he is not bound to make reparation. I am clearly of opinion that he is.

The other Judges concurred.

*Advocate's Authorities.*—Hyslop, July 15. 1696, (13908); Linning, Dec. 14. 1748, (18909 and 13913); Buchanan, June 16. 1785, (13918.)

J. PATTISON, W. S.—A. P. HENDERSON,—Agents.

No. 340. MAGISTRATES OF EDINBURGH, Pursuers.—*Sol.-Gen. Hope—L'Amy.*

D. BUDGE and COMPANY, and Others, Defenders.—*Moncreiff—More—Maitland.*

*Clause—Tax.*—Construction of a grant of impost on wine, &c. to the City of Edinburgh.

March 3. 1826.

2D DIVISION.

Lord Mackenzie.

F.

By royal grant, of date April 1. 1671, there was conferred on the Magistrates of Edinburgh a right to levy a certain impost on every pint of certain wines and other liquors ‘importando et vendendo infra dictam civitatem de Edinburgh,’—‘solvendam per venditores et cunctos alios investores dictos.’ This grant was ratified in Parliament by an act of date September 11. 1672, which in like manner bears that the duty was to be paid on the different liquors there specified, ‘to be imported or sold within the said burgh of Edinburgh, or any of the liberties thereof after specified, to be paid by the vintners, and all others the importers of the said wines, of the kinds and species foresaid.’ In 1785, an act of Parliament (25th Geo. III. c. 28.) was passed for commuting this impost in so far as it regarded private houses, by which it was declared that the imposts ‘shall be abolished, and discharged to be levied or collected, so far as respects every private family, and all others who do not fall under the description of vintners, and others herein before mentioned: And it is hereby declared, that grocers, and others retailing such liquors, do not fall within the said description, unless the said liquors shall be sold and drunk in their shops, houses, warehouses, or offices.’ But it was declared that all grants, ratifications, ‘and decrees explanatory of the same, shall subsist in full force and effect respecting vintners, keepers of taverns, or inns, or other places wherein these liquors, or any of them, are or shall be consumed by drinking, and sold for the purpose of

‘being there consumed by drinkers.’ It was further provided, ‘that whereas the revenue of the city of Edinburgh will be diminished by the aforesaid abolition of the impost on wines, foreign spirits, and foreign ale and beer, consumed in private families, be it enacted by the authority aforesaid, that at the said term of Martinmas next, the City of Edinburgh, and the Lord Provost, Magistrates, and Town Council thereof, and their successors, for themselves, and on behalf of the community thereof, in aid of the common good and patrimony of the burgh, shall have full power and authority to assess, tax, levy, and collect from all and sundry the inhabitants of the ancient royalty of the City of Edinburgh, and the inhabitants of the New Town of the extended royalty, who at present are or might have been subjected to the aforesaid impost, the sum of one pound per cent. of the valued rent of their houses and possessions, and that yearly and each year.’—Founding on these grants and acts of Parliament, the Magistrates of Edinburgh raised this action against Budge and Company, and other vintners and hotel-keepers, to have it declared that they were liable, first, in the impost duty for all wines, &c. consumed in their respective taverns, &c., on which the impost had not been already paid, whether these wines were imported directly by them, or purchased from the importers; and, second, in the commutation tax for their taverns, in respect of their own private families residing therein. It was pleaded in defence,—1. That the grants and act of Parliament limited the impost to wines imported, and that although the defenders were liable for wines imported by themselves, yet, in regard to wines purchased from wine-merchants or other importers, the duty was paid by the commutation tax levied from these persons on the amount of their house-rents;—and, 2. That as to the commutation tax, vintners were specially exempted. To this it was answered,—1. That the impost was truly on the wines sold or consumed, and was, by the original grant, leviable from the vintners as well as from the importers, and that the commutation tax was merely in lieu of the wine consumed by private families, and did not cover that leviable on wine imported by merchants, &c., when it came to be consumed in taverns;—and, 2. That vintners were only exempted from the commutation tax in their capacity as such, but that, in so far as regarded the consumption of their own families, they were liable as other inhabitants. The Lord Ordinary found, ‘that the pursuers, in virtue of the grants and acts of Parliament libelled, have right to levy from vintners, keepers of taverns, inns, public-houses, shops or cellars, within the limits libelled, or other places where French, Spanish,

**LORD GLENZKE.**—If the amendment be not essential, then the case may go on without it. If it be necessary, it is altogether incompetent, because we could not now receive a complaint containing the prayer proposed to be introduced.

**LORD PITMILLY.**—It is very plain that the objection is fatal, and that an amendment is incompetent.

**LORD ALLOWAY.**—The question as to the amendment is the only one now before us, and in regard to that, I entirely concur with the opinions already delivered; for, were we to admit the amendment, it would be allowing an evasion of the statute, under the authority of which alone we can act in matters of this nature.

*Complainer's Authority.*—Nisbet, Feb. 1. 1811, (F. C.)

*Respondent's Authorities.*—Nisbet, May 29. 1816, (F. C.); Paul, Jan. 20. 1824, (ante, Vol. II. No. 600.)

G. DUNLOP, W. S.—TATTS and YOUNG, W. S.—Agents.

No. 342.

**R. STALKER.**—*Sol.-Gen. Hope—Maidment.*

**J. MACANDREW.**—*Cuninghams.*

*Process—Stat. 6. Geo. IV. c. 120.*—A claimant in a multipointing having, prior to the above statute, lodged his claim, which was appointed to be seen, and a general order for condescendences by the claimants having been thereafter issued, held that he was not liable in expenses for not lodging a condescendence.

March 4. 1826.

1st Division.  
Lord Meadowbank.

D.

IN a process of multipointing, in which Macandrew and others were claimants, Stalker lodged a claim, which, on the 21st of June 1825, was allowed to be seen. Certain proceedings then occurred as to the competency of the action, which the Lord Ordinary, on the 16th December, sustained; appointed a condescendence for Elliot and Son to be seen, and ordained 'the hail other creditors-claimants to give in condescendences of their claims, accompanied with a note of pleas in law, with their respective grounds of debt, against the box-day, and when lodged allows the said condescendences of claims to be seen and answered between and the 6th sederunt day of January next, in terms of the statute, and relative act of sederunt.' Stalker did not lodge a condescendence, and the Lord Ordinary, in respect thereof, found him liable in expenses to the other claimants. Against this judgment he reclaimed, and contended, that as his claim had been lodged and allowed to be seen prior to the date of the statute, it was not necessary for him to lodge a condescendence, and that at all events he ought not to be subjected in expenses. The Court recalled the interlocutor, and found the opposing claimants liable in the expense of the discussion.

C. F. DAVIDSON, W. S.—Æ. M'BRYAN, W. S.—J. ARNOTT, W. S.—  
Agents.

'review of your Lordships,' and concluded with the following prayer:—'May it therefore please your Lordships to appoint this petition to be intimated to the said Sir Archibald Campbell, and appoint him to give in answers thereto, and remit to the Lord Ordinary to hear the pleas of the parties, and to do therein as to his Lordship shall seem just.' The Court remitted this petition to the Lord Ordinary, to prepare the cause in terms of the late act of sederunt; and after notes of pleas had been lodged by the parties agreeably to his Lordship's appointment, Mr. Speirs, on the 11th February, (being more than four months from the period of the freeholders' judgment) gave in this minute: 'In respect that an additional plea in law has been lodged for the respondent, which seems to imply that the prayer of the petition and complaint is imperfectly expressed, the petitioner craves to be allowed to add to his original prayer the following words—'To find that the freeholders did wrong in refusing to add the name of the said Graham Speirs to the list of freeholders for the county of Dumbarton, and to grant warrant to the Sheriff-clerk to enrol him accordingly.'" The Lord Ordinary having reported this point verbally, Mr. Speirs contended that the prayer of the petition, combined with the narrative, was sufficiently broad, and that he was entitled to have the proposed amendment received, to make it more explicit. On the other hand, Sir Archibald Campbell maintained that the amendment was incompetent, because, if the prayer were sufficient as it stood, the amendment was unnecessary; and if the prayer were insufficient, which he maintained it was, it could not be remedied so as to form a good complaint after the lapse of the four months within which a complaint must be presented. The Court unanimously instructed the Lord Ordinary not to allow the amendment.\*

**LORD JUSTICE-CLERK.**—This is certainly a novel case, but under the election statutes, which are not at all affected by the late Judicature Act, regarding merely as it does the preparation of the cause, a perfect complaint must be presented within four months from the date of the judgment complained of; and it is impossible, after the lapse of that period, to allow an amendment in any material point.

**LORD ROBERTSON** concurred. The prayer of a petition and complaint is analogous to the conclusions of a summons. The complaint here is deficient in that important part, and it cannot be amended.

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\* The Court afterwards, of consent, dismissed the petition and complaint as incompetent.

predecessor,) by a lease binding the tenant to remove, 'to the end that the successors of the said Mr. Robert Dickson may enter thereto without any previous warning, process of removing, or any formalities of law whatsoever.' Cauvin sublet a portion of this ground to M'Callum, who occupied it as a garden, and was in possession at Dr. Dickson's death, which happened in 1824. The Reverend Mr. Grant, the present incumbent, was inducted as Dr. Dickson's successor in August 1824, and in September he advertised the garden in question, along with others on the glebe, to be let; in consequence of which, M'Callum made a written offer for a new tack. This offer was not accepted by Mr. Grant, who, on the 10th November, (being the day before the Martinmas term-day,) intimated to M'Callum that he must remove from the premises. This, however, he refused to do, and therefore Mr. Grant, on the 20th, presented a petition to the Sheriff of Edinburgh, craving warrant of ejection within twelve hours after intimation. After some litigation, in which M'Callum disputed that the garden possessed by him was part of the glebe, the Sheriff (January 7. 1825) ordained him to remove within forty-eight hours; and having been charged on this decree, he brought a suspension, on the ground that tenants of glebe-lands were, like all other tenants, under the protection of the statute 1555, c. 39, and the act of sederunt 1756, and were entitled to regular warning, which he had not received; and he contended that the acts of Parliament allowing summary removal of tenants from glebe land applied only to the case of newly-designed glebes, to which the clergyman was empowered to enter summarily. To this it was answered, that no incumbent could grant a lease so as to exclude his successor from entering immediately on his induction; and that several acts of Parliament, particularly the statute 1572, c. 48, empowered clergymen to remove all possessors of their glebes and manses, though not newly designed, without warning, to the end that they might, without delay, obtain their residence within the parish, in order to commence performance of the duties of their office; and that in the present case, although no formal warning was given, the tenant had been made aware that he was not to continue to occupy the ground after Martinmas, and had received special notice to remove ten days before the application to the Sheriff. The Lord Ordinary found the letters orderly proceeded, and the Court adhered.

**LORD ROBERTSON.**—If warning be required by law in a case like this, it will still be necessary, notwithstanding the clause in Cauvin's lease binding him to remove without warning. But, in re-



gard to a manse and glebe, (which are in *pari casu*, and the possession of which is equally necessary to enable the minister to reside in his parish,) warning is not necessary, and the incumbent is entitled to possession summarily on his induction.

**LORD JUSTICE-CLERK.**—From the death of the previous incumbent, the right of the tenant of the glebe ceases; and it would be most prejudicial to the interests of the parish, were the new clergyman obliged to give regular warning in terms of the act. The tenant here had fair certioration that he was to quit long before the term, and he had also ten days regular notice.

**LORD ALLOWAY.**—I entertain great doubts as to the abstract rule of law on which the Sheriff's interlocutor necessarily proceeds, and as to whether the act 1572 applies to this case. That act has reference only to tacks granted to the prejudice of the next incumbent; and where the glebe is in such a situation that the minister will not occupy it himself, but must let it to tenants as is the case in many parishes of Scotland where the glebes are very extensive, and at a considerable distance from the manse, a tack must be held to be for his advantage, and not to his prejudice. In the present case, this part of the glebe has always been in use to be let by the minister himself, and the present incumbent has also advertised it to be let. In these circumstances, I do not see why tenants of a glebe should be in a different situation from any other liferent tenants. Neither of the two cases quoted for the minister apply here; as that of Couper related to the manse, which does not fall under the act 1555—that statute having no reference to houses, and the case of Hannay related to a glebe newly designed.

**LORD GLENLEE.**—I think the interlocutor right. I do not found my opinion, however, on the first part of the act 1572, which only relates to the designation of glebes, but on the declaratory part of it. It is said that a minister is to be considered as in exactly the same situation with an ordinary liferenter; but I doubt this very much, as our regulations regarding liferenters have arisen from rules of common law;—and even as to tenants of ordinary liferenters, although they cannot be removed till the Whitsunday after the liferenter's death, yet I doubt if they are entitled to regular warning in terms of the statute and A. S. With regard to a minister, however, who has the right of entering into possession by statute, we cannot apply the rules of common law which hold as to ordinary liferenters. I do not say but that there may possibly be cases where these rules might apply, as where the glebe was let with consent of the presbytery, and for the obvious benefit of the clergyman; but, in the general case, a tenant of a glebe possesses *sine titulo* after the incumbent's death, and requires no regular warning, although undoubtedly he must have reasonable notice. He had such

notice however here, and Martinmas is the proper term of removal from a garden.

**LORD PITMILLY** concurred.

*Suspender's Authorities.* — 1555, c. 39; A. S. Dec. 14. 1756; 2. Ersk. 10. 61;

*Johnston's Trustees*, July 2. 1803, (15307.)

*Charger's Authorities.* — 1572, c. 48; 1594, c. 202; 1606, c. 7; Couper, Dec. 22. 1692, (13831); *Hannay v. Rutherford*, Feb. 6. 1628, (14989.)

**J. JOHNSTON, — JAMES ROBERTSON, W. S. — Agents.**

No. 345.

**J. KNOWLES**, Pursuer. — *Murray — Currie.*

**A. BINGS and A. DAVIDSON**, Defenders. — *Sol.-Gen. Hope — Maidment.*

*Tack — Irritancy.* — Circumstances under which tenants who had incurred an irritancy of their lease by non-payment of rent, were reponed against it.

March 7. 1826.

1st DIVISION.

Lord Meadowbank.

H.

**KNOWLES** brought an action of declarator of irritancy of a lease held by Bings and Davidson, in respect of having incurred a forfeiture by non-payment of the rent; and on the 22d of June 1825, the Lord Ordinary ordained 'the defenders to pay up the rents libelled, on or before the first box-day in the ensuing vacation, and assigned the first sederunt day in November next to the defenders to produce in the clerk's hands the evidence of the extinction and payment of the rents, as said is; with certification.' In the course of the vacation, an order by a bank in Aberdeen on a bank in Edinburgh, in favour of the pursuer's agent, for payment of the rent, was transmitted to him; but he, alleging that it did not contain the whole rent, and was not such a payment as he was bound to receive, refused it; and the Lord Ordinary, on the 12th of November, decerned and declared in terms of the libel, 'in respect that there is no evidence produced that the amount of the rents libelled and decerned for was tendered to or received by the pursuer, or that after the money was so tendered and refused, the same was consigned in a bank, and in respect the money is not now offered at the bar.' The defenders then reclaimed, and stated, that as the order was taken in favour of the pursuer's agent, and he declined to indorse it, they were unable to get payment of its contents; that they were ready to pay the full amount of the rent so soon as they were enabled to get up the money, and that, in the circumstances, decree of extinction ought not to have been pronounced. The money having been afterwards obtained, the Court remitted to repon the defenders, on payment being forthwith made.

**J. L. MITCHELL, W. S. — C. F. DAVIDSON, W. S. — Agents.**

J. REID, Petitioner.—*J. W. Dickson.*

No. 346.

HOPE'S TRUSTEES, Respondents.—*Christison.*

*Execution pending Appeal.*—Warrant granted for consignation in a bank of a sum decerned for pending appeal, on caution by the party demanding it, who was on the poor's roll, for the difference between bank and legal interest, in the event of a reversal.

THE case noticed ante, Vol. IV. No. 271, having been appealed, Reid, who was on the poor's roll, applied for interim execution, to the effect of having the sum decerned for consigned in a bank, upon a receipt payable to the order of the Court. This was opposed, on the ground that, in the event of a reversal, a loss of interest would thereby be sustained; but Reid having offered to find caution for the payment of any loss which might thereby be sustained, the Court granted the prayer of the petition.

March 7. 1826.

1st DIVISION.

H.

J. YOUNG,—W. Renny, W. S.—Agents.

JANET CAMERON OF M'NEILL, Pursuer.—*Sol.-Gen. Hope—M'Neill.*

No. 347.

R. M. H. M'NEILL, Defender.—*Moncreiff—Jameson.*

*Bond of Annuity—Discharge—Turpie Cause.*—Circumstances under which it was held that a discharge of a bond in favour of creditors did not operate as a discharge, in favour of the grantor of it; and an allegation of the bond having been given ob turpem causam was disregarded.

IN 1805 M'Neill granted an heritable bond of annuity over his estate of Raploch in favour of the pursuer, who was there described as his wife; and on this deed infeftment was taken. Thereafter M'Neill became insolvent, and having executed a trust-deed for behoof of his creditors, and they having threatened to bring a reduction of the bond, the pursuer, along with M'Neill, executed a discharge and renunciation in their favour in 1806, by which she declared 'that the said lands, teinds, and others 'above specified, out of which the said annuity is payable, are 'free, loose, and disburdened thereof, and of the infeftment 'above mentioned, in all time coming;' and the bond was accordingly delivered up to the trustee. In 1810 a mutual agreement was executed, in the Isle of Man, between the pursuer and M'Neill, in which the former was described as 'spinster;' and on the narrative that they had 'at various times heretofore cohabited together,' and in consideration 'of the services by the 'said Janet Cameron for him the said Roger Montgomery Ha-

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1st DIVISION.

Lord Eldon.

S.

‘milton M’Neill heretofore done,’ and that issue had been born, he bound himself to pay to her £40 yearly, ‘in order to make some provision for and towards the maintenance of the said Janet Cameron and her said three children, for and until the said Janet Cameron shall be enabled to recover and receive a certain annuity, or yearly-rent charge of £100, which the said R. M. Hamilton hath heretofore granted unto the said Janet, by the name of Janet M’Neill otherwise Cameron, for the term of her natural life, and made a charge upon and payable out of certain estates to which he is entitled in that part of the said united kingdom called Scotland, the issues and profits of the said estates are now, and for some time have been applied towards payment and liquidation of certain debts by the said R. M. Hamilton heretofore due and owing.’ This restricted annuity not having been regularly paid, and the pursuer alleging that the trust had now been discharged, and that M’Neill was in possession of his estate, brought an action, concluding to have it found that she was entitled to payment of the arrears of £40 prior to the date of the defender’s restoration to his estate, and thereafter to the payment of £100 per annum. In defence it was stated, 1. That the bonds were null and void, because they had been granted ob turpem causam, the defender having been married at the period when the first was executed, and the second plainly imported that it was granted as the wages of prostitution;—2. That the bond for £100 had been absolutely discharged;—and, 3. That although he had obtained possession of his estate, yet he had done so by means of borrowing money, for which heritable securities were granted, and therefore he was in the same situation as when the trust was in existence. To this it was answered,—1. That the parties had been married in facie ecclesie, and that it was not true that there was any impediment to their marriage, and no reduction of the bonds had been brought;—2. That the discharge had not been granted in favour of the defender, but of his creditors, and was only intended for their benefit;—and, 3. That as the condition of the restricted bond was now purified, she was entitled to payment of the annuity of £100. The Lord Ordinary found that ‘the condition upon which the pursuer agreed to give up her annuity of £100 sterling, until the then existing debts of the defender should be settled was purified and at an end in July 1820, and that she is entitled, to such annuity from that time, and in all time coming during the term of her natural life, payable at the terms and by the proportions specified in the heritable bond of annuity libelled on,’ and decreed accordingly; and the Court adhered.

*Defender's Authorities.*—(1.) Durham, July 20. 1622, (9469) ; Hamilton, June 26. 1765, (9471.)

D. M'LEAN, W. S.—D. STEWART, W. S.—Agents.

R. WADDELL and Others, Petitioners.—*More.*

No. 348.

*Process—Appeal.*—The Court, on the application of a single creditor, granted warrant for a meeting of creditors to elect a new trustee, for the purpose of appearance as respondent in an appeal to the House of Lords.

DONALD, as trustee on Corbet's sequestrated estate, having sold an heritable property of the bankrupt's to Dick, the latter brought a suspension of payment of the price on the ground of the insufficiency of the title. The Court repelled the reasons of suspension, and Dick appealed, as mentioned ante, Vol. I. No. 188. Before the appeal came on for hearing, Donald, the trustee, died ; and Waddell and others, trust-disponees of the Rev. James Stewart, holder of an heritable bond over the property, and as such having the sole interest in the question, made application to the House of Lords to be permitted to sist themselves as respondents in the appeal. The House did not grant this prayer, but ordered that Waddell &c. ' be at liberty to apply to the Court ' of Session, notwithstanding the appeal, for permission to take ' such steps as the Court may think right for the making a new ' trustee in the room of the said late respondent, John Donald, deceased.' Waddell accordingly emitted an affidavit as to the heritable debt due to his constituent Stewart, leaving, after deduction of the value of the security, a sum of £505 due by the estate, and presented a petition (along with his co-trustees) praying the Court to appoint a meeting of Corbet's creditors to elect a new trustee ; but as the estate was nearly wound up, and there was no further hope of a dividend, no other creditor would concur with him, so as to enable him to make the application in name of two creditors, as required by the 71st section of the Bankrupt Act. The Court, in respect of the judgment of the House of Lords, granted the prayer of the petition.

March 7. 1826.  
2d Division.  
B.

W. and A. G. ELLIS, W. S.—Agents.

In the case of the Earl of Moray v. Eyre and Others, the decision of which depended on the ultimate result of the case ante, Vol. IV. No. 195, and which it was alleged was to be appealed, the Court suspended giving judgment till the issue of the appeal.

No. 349. ALEXANDER RITCHIE, Suspender.—*Murray—Robertson.*  
JOHN MACKAY, Changer.—*Moncreiff.*

*Reference to Oath—Infamy.*—The acceptor of a bill drawn by his brother, having been charged by a creditor of the latter, who had taken up the bill after it was past due, presented a bill of suspension, in which he offered to prove no value by his brother's oath; but in the course of the litigation, the brother having been rendered infamous by conviction of a crime, the Court refused to allow the reference to his oath.

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2d DIVISION.

Lord Cringetie.

B.

ALEXANDER RITCHIE accepted a bill for £250, drawn by his brother James, and payable, three months after date, at the office of the Commercial Bank, in which James possessed five shares. These shares were, by a regulation of the Bank, subject to retention till payment of any debts due by the holders of the stock, who were obliged to offer them to the Directors in the first instance. The bill was discounted by James with the Bank; and on its becoming due in June 1817, he wrote to the manager, of date 17th June, 'You are to sell my shares at £160 each, and to pay 'yourself for this bill of mine.' The Bank declined to accept the shares at that price, and wrote to James, requiring him to remit payment of the bill, then under protest; but it did not appear that they had intimated the dishonour to Alexander, the acceptor. James Ritchie became bankrupt shortly afterwards, but there was no proof of this having happened within 60 days of the letter to the Bank; and, on the 18th of August following, he executed a trust-deed for behoof of his creditors. The trustee, in order to remove the obstacle to the transfer of the shares of Bank stock which arose from the bill lying at the Bank unpaid, employed Mackay, (who was one of James Ritchie's creditors,) to pay the bill as a third party; which he accordingly did, obtaining from the Bank an assignation to it, and to the protest. Thereupon a charge was given by Mackay, for his own behoof, and that of certain other creditors of James Ritchie, to Alexander, the acceptor, who presented a bill of suspension, in which he offered to prove by the oath of his brother, the drawer, that the bill was accepted without value. This having been passed, and the letters expedite, M'Kay contended that, as an onerous bonâ fide holder, he could not be affected by the defence of no value; but the Court, after some litigation, found (ante, Vol. II. No. 333.) that Mackay was not entitled to the character and privileges of a bonâ fide and onerous holder. The suspender was accordingly held entitled to plead against Mackay that the bill was accepted by him without value; and he gave in a minute, referring this to the oath of his brother, the drawer. To this reference it was objected by Mackay,—1. That it was incompetent to prove no value

against creditors by the oath of a bankrupt, when he was so nearly related to the party referring, as not to be a *habile witness* for him;—and, 2. That James Ritchie had been rendered infamous in the year 1818, (subsequently, however, to the raising this process of suspension,) by a conviction before the Circuit Court of Justiciary for falsehood, fraud, and wilful imposition, followed by a sentence of imprisonment, which had been duly executed. The Lord Ordinary reported the cause, and the Court, by a majority, found that ‘in respect that James Ritchie was convicted, and received sentence for a crime which rendered him infamous, the proposed reference to his oath is incompetent.’

**LORD GLENLEE.**—The effect of the former interlocutor of the Court went merely to this, that the charger was not entitled to the peculiar privileges of a *bonâ fide* and onerous holder of a bill, and was accordingly liable to any objection which might have been pleaded against the drawer himself. The necessity of proving no value by writ or oath does not arise from any rule peculiar to bills of exchange; for the same would apply to the case of a bond, or any other written obligation acknowledging receipt of money, if that were denied. The charger never possessed in him the character of general trustee for the creditors; and although he appears for certain other creditors, he is in no better situation than if he were charging for himself alone. Now, in determining the right of the suspender to refer to the bankrupt's oath against his charge, it is necessary to attend to the circumstances of the case, some of which are certainly in favour of the suspender. It is much in his favour that the bill was due so early as 1817, and that the drawer was in *cursu* of paying it out of his own funds before he became bankrupt, and granted the trust-deed; and the charger having interfered to prevent the bill being paid in this way out of the Bank stock, it is difficult to say that the suspender should be refused the benefit of the bankrupt's oath. If, from the way and manner in which he has acquired the bill, the charger has put himself in the bankrupt's shoes, then the case is the same as if the bill were still in the bankrupt's hands, and reference had been made by his brother to his oath. I rather think that the reference ought, *hoc statu*, to be allowed.

**LORD PITMILL.**—The record is confined to the sole point of the competency of admitting the bankrupt's oath, and I cannot entertain much doubt that, on the ground of *infamia juris*, the oath cannot be received. If James himself had been the charger, it might have been difficult to allow him to plead his own infamy; but here, with a party entitled to take up the bill, he is in fact a witness.

**LORD ALLOWAY.**—Every person is undoubtedly entitled to prove his case by the oath of his adversary, although a relation, unless there be collusion; and in reference to the existence of collusion here, it is important to observe that the bill was made payable at the Commercial Bank, where the drawer held five shares, forming a fund wherewith to retire it, and that the moment it fell due, he wrote to the Bank, desiring them to sell his shares and pay the bill, thus acknowledging the bill to be truly his own debt; and there is no evidence that he was made bankrupt within 60 days of this. After the trust-deed was executed, too, the trustee at first made provision for paying the bill, but afterwards got Mackay to take it up, and charge on it. A bill of suspension was then presented so far back as 1817, in which it was stated that the bill was for James Ritchie's accommodation, and this was offered to be proved by his oath. The taking of the oath has been put off by the discussion of the pleas unsuccessfully maintained by Mackay, and the conviction supervened only after the subject had become litigious. I can see no reason to suspect collusion, so as to deprive the party of his right at common law to refer to his adversary's oath. If this charge had been given by the bankrupt himself, there can be no doubt but that reference might have been made to his oath. A creditor, however, under a voluntary trust, cannot be in a better situation than the bankrupt himself. Mackay is not entitled to be considered as an onerous assignee, but is in exactly the same situation with the drawer, and cannot, by prolonging the litigation, preclude the privilege of reference. Neither can a party, by committing a crime, put himself in a better situation quoad his adversary; he cannot plead his own infamy, and as little can any one else, founding on his right, and standing in the same situation with him as the charger here does.

**LORD JUSTICE-CLERK.**—It is necessary to confine our attention to the sole question taken to report by the Lord Ordinary, which is a very important one. Had the case rested merely on the objection of relationship, I am not prepared to say that the reference would have been incompetent; but the second objection is very different, viz. whether it is competent to refer to the oath of a person rendered infamous by the verdict of a Jury? This objection is met by the answer, that because he was not infamous when the action commenced, we must shut our eyes to the supervening infamy. The Court, however, can look to nothing but this, whether, at the time the oath is to be taken, he is infamous or not? And as the party here is undoubtedly so, I think his deposition cannot be taken to any effect in a Court of Justice, and that a Judge cannot look at it. He is dead in law, and in the same situation as if he were so naturally.

**LORD ROBERTSON.**—It appears to me that the objection on the



ground of infamy is perfectly good, and that the infliction of the punishment does not remove the incapacity. The reference is therefore incompetent.

C. GORDON,—W. DUTHIE, W. S.—Agents.

Hon. E. G. SINCLAIR, Complainer.—*Sol.-Gen. Hope—Horne.* No. 350.  
W. INNES, Respondent.—*Moncreiff—Matheson.*

*Freehold Qualification.*—Held incompetent to object, by exception in the Court of Freeholders, to a certificate of valuation and decree of division, *ex facie* correct.

March 8. 1826.

1ST DIVISION.  
Lord Medwyn.  
S.

AT the Michaelmas Head Court of the Freeholders of the county of Caithness, held on the 30th September 1825, Mr. Sinclair claimed to be enrolled on certain titles; and he produced a certificate by two commissioners and the clerk of supply, that the lands were rated and valued at the sum of £452:19:5 Scots. To this it was objected that the certificate referred to a decree of division of a cumulo valuation of £11,048:7:6; but that it appeared that, in carrying through the splitting, there were deducted from the cumulo valuation two sums as having previously stood split and separated, although the cess-books instructed no such thing. This objection having been sustained by the freeholders, Mr. Sinclair presented a petition and complaint, which having been remitted to Lord Medwyn to prepare the cause, his Lordship ordered Notes of Pleas in law, and thereafter reported it on Cases to the Court. On the part of Mr. Sinclair, it was contended that he had produced the evidence usually founded on to entitle him to be enrolled; and in particular, a certificate by two commissioners and the clerk of supply, showing that the lands were of the requisite valuation; that the freeholders, in judging of the validity of the claim, were not entitled to look beyond that certificate, with the exception that they might compare it with the valuation-books, in which the decernitures of the commissioners dividing cumulo valued rents are engrossed; that the decree of division was *ex facie* unobjectionable, and that they were not entitled to resort to the antecedent steps of the process to show that it was erroneous, and could not object to it, except in an action of reduction. To this it was answered, that the decree to which the certificate referred was *ex facie* incorrect, on the ground stated in the Court of Freeholders, and therefore an action of reduction was not requisite. The Court sustained the complaint, appointed

Mr. Sinclair to be enrolled, and granted warrant for interim extract to that effect.\*

The Court were of opinion that there was no *ex facie* nullity in the decree, and therefore that it could only be objected to by means of a reduction.

*Complainer's Authorities.*—Wight, 222; Burn, Feb. 17. 1779, (8852); Adam, July 4. 1809, (F. C.); Don, Feb. 4. 1818; (F. C.), Wight, 200; Bell, 236, and cases there; Wight, 134; Rose, January 1766.

A. MONYPENNY, W. S.—J. GORDON, W. S.—Agents.

No. 351.

C. SMYTH, Pursuer.—*Sol.-Gen. Hope—W. Bell.*

A. NISBET, Defender.—*Moir.*

*Expenses—Decree in Absence.*—Held that a party who had allowed decree in absence to pass against him, is not entitled to pursue a reduction of it, till he pay the expenses of the decree.

March 9. 1826.

1st Division.

Lord Medwyn.

8.

SMYTH raised an action of reduction against Nisbet of a decree of constitution, dated the 14th May 1818,—of another dated the 27th November 1823,—and of a decree of adjudication, on the ground, *inter alia*, that they had passed in absence, and in an irregular and precipitate manner. Against this action Nisbet stated, as a preliminary defence, that Smyth had been personally cited to the first action, and had been cited to the second, by leaving a copy at his dwelling-house with his daughter;—that he entered appearance, and took out the summons to see, but lodged no defences;—that he was cited personally in the process of adjudication; took out the summons to see, but returned it without defences, and, after decree was pronounced, he borrowed the process, but gave in no representation. He therefore maintained that Smyth had no title to insist for reduction of these decreets, till he had paid the whole expenses incurred in relation to them. The Lord Ordinary, ‘in respect it is admitted on the part of the pursuer ‘that he was personally cited to the second action brought at ‘the defender’s instance against him in 1823, and that it is not ‘denied that his agents took out the process to see, and returned ‘the same without any defences, and to the expense of which ‘action, decree pronounced therein of date 27th November 1823, ‘and adjudication and other diligence following thereupon, the ‘defender now restricts his claim; found that before the pursuer ‘of this reduction can be heard upon his reasons for opening up

\* Similar decisions were pronounced in complaints by R. A. M’Kay and J. Buchanan, Esquires.

' the decree and diligence, he must pay the defender the expense  
' thereby incurred by him ;' and therefore found him liable accordingly, and the Court adhered.

D. M'LEAN, W. S.—CARNEGIE and SHEPHERD, W. S.—Agents.

J. GARDINER and Others, Complainers. — *Sol.-Gen. Hope* — No. 352.  
*Moncreiff—Ivory.*

MAGISTRATES of KILRENNY, Respondents. — *D. of F. Cranston—M'Neill—H. Bruce.*

*Burgh Royal.* — Circumstances in which it was held that the mode of election of magistrates, prescribed by the set of a burgh, could not be affected by a practice, which, although it had existed for a considerable time, was not so uniform or so decisive as to destroy the set.

March 9, 1826.

1st Division  
D.

By the Set of the burgh of Kilrenny, ' the town-council consists of 15 persons, viz. three bailies, the treasurer, and 11 burgesses. The election proceeds after this manner. Three days before the third Thursday of September, which is the day prefixed for the said election, the bailies cause their town-officer by tuck of drum make intimation to the haill inhabitants, requiring all the habile burgesses within the burgh to repair to the tolbooth upon the prefixed day, and there give their respective votes in the election of bailies and treasurer for the ensuing year; it being the custom of the said town, ever since its erection into a royal burgh, to elect their bailies by a vote of the haill burgesses that will qualify in terms of law. In obedience to which intimation, the haill burgesses convene accordingly about nine o'clock in the morning; but, before election, the old bailies and council convene in the council-house, and take in the treasurer his accounts of intronissions with the town's patrimony that year; which being done, and him discharged, they immediately nominate a new council for the ensuing year, and thereafter ordain all the burgesses that are to vote, to qualify according to law, which being also done they proceed to elect; and first the bailies give in a leet of nine persons, whereof they themselves are always three, out of which they are to choose the three bailies for the year ensuing, and the treasurer gives in his leet of three persons, whereof he himself is always one, out of which they are to elect their treasurer for the said year; which being read over in presence of the council, and approven of by them, is read publicly in audience of the haill burgesses that are to vote: This being done, the clerk is appointed to sit within the council-house and mark the votes, there being always one of the council

‘appointed to oversee his right marking; and accordingly, first the bailies, then the treasurer, council, and thereafter the hail qualified burgesses, one by one, give their several votes for the bailies and treasurer for the said ensuing year, and the persons chosen by a plurality of votes, together with the new council, immediately convene within the council-house, and accept of their respective offices, and give their oaths de fideli administratione, the same being tendered to the three bailies by the clerk, and by them first to the treasurer and then to the council, which being done, they adjourn.’ The form in which these leets were framed had varied between the period of the Union and the present time. For the twelve annual elections following the Union, the leet was sometimes written out in one continued and vertical list of nine persons, including the three old bailies, and sometimes in three columns containing three names each. In 1719, however, and thenceforward, the leet for bailies, as voted upon by the burgesses, was composed of three separate trios or columns,—each trio having at the head of it the name of the old bailie, followed by those of two other persons,—and each of these trios was designated as the leet of the bailie who was at the head of it; and when the votes were given, the electors voted for some one or other of the three persons in each of these trios severally, so that in this way the burgesses voted for a first bailie out of that magistrate’s leet, and for the second and third bailies out of the leets of those magistrates respectively. In the return, however, made by the clerk, there was no reference as to either of the persons so elected having precedence as first, second, or third bailie, but he merely announced the names of the parties who had the plurality of votes, and the town-council declared either of them to be the first or second magistrate as they thought fit, and without being governed by the number of votes.

At the election of 1823, the leet was not subdivided into trios, but contained nine names in a vertical line, of which the three first were the old bailies, and the following six the nominees, so that the votes of the burgesses were taken generally without any reference to the several offices of first, second, or third bailies. The three persons elected were the same who had been in office for the former year, and they were three of the nine who had the majority of votes; but the person appointed by the town-council first magistrate had only 30 votes, while those who were declared second and third had each 57. In whatever form, however, the leet had been framed, these persons would have had a majority of votes. Of this election Gardiner and others, burgesses, complained, on the ground that the former practice of voting on

separate leets for each of the bailies had not been observed, and that the council had usurped to themselves the power of nominating them to the places of first, second, or third magistrate, according to an arbitrary rule of their own. To this it was answered, that the election had been made in the form prescribed by the set, and that the persons who had been chosen had the plurality of votes, and precedence had been assigned to them by the council, agreeably to use and wont. The Court at first dismissed the complaint, and thereafter, on advising a reclaiming petition, remitted, before answer, to a reporter 'to examine the whole record 'books of the burgh of Kilrenny, and also the whole books for 'the period subsequent to the Union down to the present time, 'so far as the same are in existence, and to report to the Court 'every thing occurring to him to be material to the issue, and appearing from said books in relation to the practice of the burgh 'regarding the mode of framing and of giving out the leets, and 'also respecting the mode of conducting the elections in said 'burgh;' and a report having been made to the effect above stated, the Court adhered.

At the first advising LORD BALGRAY observed, that the set of the burgh must form the rule, and that it would require a practice of very long endurance, and entirely at variance with it, to get quit of it. But, independent of this, there appeared to be no reason for objecting to the form in which the leet was given out, because the burghesses had merely the nomination of the bailies, while the council fixed the precedence, and on this occasion the persons chosen would have been elected, in whatever form the leet was framed. The other Judges, with the exception of Lord Hermand, were of the same opinion; and, at the second advising, they unanimously considered that there had been no such invariable practice as to have abolished the set; and that, in other respects, the complaint was unfounded.

R. M'KENZIE, W. S.—J. KER, W. S.—Agents.

Mrs FRASER TYTLER and HUSBAND, Pursuers.—*A. Bell.*  
Their CHILDREN, Defenders.—*Skene—Alison.*

No. 353.

*Entail—Clause.*—Provisions in an entail which were held not sufficient to supply the want of an express prohibition to alter the order of succession.

THE late George Grant executed a deed of entail of his estate in favour of his daughter, Mrs. Fraser Tytler, and a certain order of heirs. The usual clause, expressly prohibiting an alteration of the order of succession, had been omitted to be inserted in

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Lord Mackenzie.  
M'K.

the entail, which, however, contained the following provisions, ' That the heirs, male or female, of my body, and whole other heirs of tailzie above specified, shall take and possess the lands, estates, and others above written, upon this tailzie or deed of settlement only, and upon no other right or title whatsoever; and that they shall use any other rights and titles which they may happen to have or acquire thereto as additional and collateral securities and titles for strengthening and supporting this deed of tailzie, and for no other purpose whatsoever; and that they shall insert the said whole heirs of tailzie and order of succession, and all the conditions, limitations, provisions, prohibitive, irritant, and resolute clauses herein contained, in the charters and infeftments to follow hereon, and in all services, retours, and instruments of sasine of the lands and others above specified, or any part thereof: ' That in case of any apparent or presumptive heir, or other substitute, who may at any time succeed to the said lands and estate hereby conveyed, in virtue of the above destination, shall by law be incapable of succeeding to the same, by reason of forfeiture or attainder, or other legal incapacity that may exclude any such apparent or presumptive heir or substitute from taking, holding, and enjoying, for their own use and benefit, my said lands and estate, in virtue of the above substitution, then and in that case it shall be lawful to any of the heirs of tailzie who shall be in the right of the said lands, estate, and others for the time, so often as such case shall happen in all time coming, so far to alter the destination of succession above written, as to seclude such incapable person or persons from the succession to the foresaid lands and estate, the said restriction and limitation notwithstanding; and for that end to grant and execute such deed or deeds as shall be necessary, available, and competent in the law, in the same manner, and as effectually, as an unlimited owner or proprietor might do; provided, nevertheless, that, with respect to the whole other heirs of tailzie, the prohibitions to alter the course of succession shall have their full force and effect. And it is hereby provided and declared, if the heir in the right of the estate for the time shall be clothed with a husband, that, notwithstanding thereof, it shall be competent to her, without consent of her husband, to make the foresaid alteration in the course of succession, excluding the person or persons to hold or enjoy the said estate as aforesaid; and with and under this provision and condition also, that it shall not be lawful to, nor in the power of, the heirs of entail above specified, or any of them, to sell, dispoise, alienate, dilapidate, or put away the lands above written, or any part

'thereof, or to contract debt, grant bonds, or any other rights, deeds, or securities, or to do any act, civil or criminal, that shall be the ground or foundation of any adjudication, eviction, or forfeiture of the said lands and estate, or any part thereof, or which may any ways affect or burden the same.'

After Mr. Grant's death, Mrs. Tytler and her husband brought an action against the whole existing heirs of entail, to have it declared that the deed 'contained no valid prohibition against altering the order and course of succession thereby appointed, and was on that account defective and insufficient as an entail of the said lands.' The Lord Ordinary found 'that the disposition and deed of entail libelled, which was executed by the late Mr. George Grant, contains no prohibition against altering the order and course of succession thereby appointed; and therefore that deeds altering the said order and course of succession may lawfully, validly, and without irritancy, be executed by the persons having vested in them the proper right and title under the said entail;' and the Court adhered.

JAMES TYTLER, W. S.—M'KENZIE and INNES, W. S.—Agents.

A. J. HAMILTON, Suspender.—*Skene—Brown.*

No. 354.

Reverend J. CLASON, Charger.—*Sol.-Gen. Hope—J. Miller.*

*Manse.*—Circumstances in which heritors were obliged to build a new manse in a new situation, although part of the old building was capable of being repaired.

THE manse of Dalzell consisted of an old building, which had originally formed the whole dwelling, and an addition, built about 26 years ago, consisting of a dining-room, with a bed-room and closet above. It having fallen into a state of great disrepair, Mr. Clason, the incumbent, applied to the presbytery of Hamilton to have the heritors decerned to build a new manse, and in a more healthy situation. The presbytery remitted to tradesmen, who reported their opinion, 'That, in all the circumstances, the manse cannot be repaired so as to afford competent and comfortable accommodation for the minister and his family, and that it would be expedient for the advantage of all concerned, to cause the manse to be taken down, and rebuilt in a suitable and substantial manner.' On this the presbytery appointed a new manse to be built, and further, 'considering that the present situation of the manse is very damp, immured, uncomfortable, and unhealthy,' they appointed it to be erected on another part of the glebe pointed out by them. This judgment of the presbytery was brought under review by a suspension and interdict,

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Lord Mackenzie.  
B.

at the instance of Mr. Hamilton, as commissioner for General Hamilton of Dalzell, the principal heritor of the parish, on the ground that the newest part of the manse was capable of repair, and that the heritors ought not therefore to be subjected to the expense of erecting an entirely new building, and on a new site. The Lord Ordinary remitted to Mr. Burn, architect, to report whether the manse 'is capable of being repaired so as to render it a suitable and comfortable residence for the minister, and whether it should be altogether rebuilt.' Mr. Burn reported, that 'it is incapable of being repaired, or made a suitable and comfortable residence for the minister, with the exception of that part of the building in which the dining-room is situated;' and with regard to that part, that it would require a considerable portion of repair, but 'is capable of being repaired and made comfortable,' though, from the difference of level, 'not well adapted for having a convenient addition made to it;' and on the whole he recommended an entirely new manse. The Lord Ordinary, on considering this report, 'repelled the reasons of suspension.' Hamilton then reclaimed, and the Court remitted again to Mr. Burn to report, '1. How far the manse in question is defective in safety, comfort, and accommodation for the use of a minister of that parish. 2. Whether by any, and if by any, by what repairs, alterations, and additions it may be rendered a sufficient manse, and at what expense. 3. At what expense a sufficient new manse, affording proper accommodation to the minister, could be furnished;' and, 4. to report on the plans and estimates of additions and repairs given in by Hamilton and those of the presbytery for a new manse. Mr. Burn accordingly gave in a second report, stating his opinion, 'That the manse in question is defective in safety and accommodation;' and that, in addition 'to the discomfort arising from the state of total disrepair of the present building,' he considered it 'extremely doubtful if the comfort of the manse can be effectually secured where the area around is so confined and limited, and the church-yard continued in its present situation.' He further reported, that the expense of the addition to the more recent part of the manse which was capable of repair, and of the repairs in it, would amount to £650, while an entirely new manse in the new situation might be built for £678. The Court, in consideration of the special circumstances of the case, adhered to the Lord Ordinary's interlocutor; restricting, however, the amount of the expense of the new manse to £678.



Dr. BALMANNO, Petitioner.—*Rutherford.*

No. 355.

D. M'NEE, Respondent.—*Cunninghame.*

*Appeal—Application of Judgment.*—Held that a party presenting a petition to apply a judgment of the House of Lords reversing the interlocutors of the Court of Session, is not entitled to the expenses of the petition.

THE case noticed ante, Vol. III. No. 42, having been reversed on appeal, Balmano presented a petition to have the judgment applied, and prayed for the expenses of the petition; and in support of his demand for these expenses, he referred to Davidson, June 25. 1824, ante, Vol. III. No. 124, and to other cases where the Court had granted expenses. To this it was answered, that the respondent was ready to have paid the expenses without the order of the Court, and therefore they ought not to be awarded, and that there was no such general rule as that alleged. The Court applied the judgment, but refused to allow the expenses.\*

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D.

THE LORD PRESIDENT observed, that if the Court had allowed expenses in former cases, they must have done so per incuriam.

W. RENNIE, W. S.—J. M'DONELL, W. S.—Agents.

JANET TELFORD, Petitioner.—*A. M'Neill.*

No. 356.

KIRK-SESSION of ANCRUM, Respondents.—*Cay.*

*Poor—Jurisdiction.*—A petition and complaint accusing a kirk-session of improperly delaying to give judgment on an application by a pauper for aliment, sustained as competent, but dismissed on the merits.

TELFORD presented a petition and complaint to the Court, stating that she was a pauper in the parish of Ancrum, and had applied for aliment to the heritors and kirk-session by a written petition, but that they refused to write on it, or to give her any assistance. She therefore prayed that they should be ordained forthwith to dispose of her petition in one way or another, and

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S.

\* The principle on which the Court allowed expenses in the former cases was at that time stated to be, that when a judgment was reversed, it was necessary to present a petition to have the judgment applied, and an alteration made upon the record; and that it was therefore equitable that the party who was thus obliged to incur that expense should be indemnified: but that where a judgment was affirmed, no petition was necessary, seeing that the judgment stood affirmed upon the record, and therefore there was no equity for awarding expenses in favour of the party making that unnecessary application.

to grant her an interim aliment. The Court sustained the competency of the complaint, and appointed it to be answered within forty-eight hours after service; but on advising it, with answers, they dismissed it on the merits.

A. KENNEDY, W. S.—H. DAVIDSON, W. S.—Agents.

No. 357. J. M'NAIR and Others, Suspenders.—*Moncreiff—Marshall*.  
M'LAUCHLAN and M'KEAND.—*Jameson*.

*Common Property*.—A party having, without judicial authority, made certain alterations on a tenement, of which the under floor belonged to him, and the upper to another, whereby the latter was injured and endangered, the Court ordered the premises to be restored to a state of absolute security, without regard to the expense which would thereby be occasioned.

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Bill-Chamber.  
Lord Meadow-  
bank.

M'LAUCHLAN and M'KEAND were proprietors of the first floor above the ground flat of a tenement at the Cross of Glasgow, and the second and upper flats belonged to the Glasgow Widows' Fund Society, of which the suspenders were the officers. Without obtaining any judicial authority, M'Lauchlan and M'Keand removed a bearing wall which was built of brick, was nine inches thick, and which supported the floor and upper parts of the tenement belonging to the society; and in place of this wall they substituted five iron pillars, and, in order to introduce them, they cut away about one-half of the depth of the joists on which the floor of the Society rested. A petition was then presented by the Society, praying for a warrant against M'Lauchlan and M'Keand 'to rebuild the said bearing partition, and repair and replace 'such of the joists as have been injured and weakened by them, 'and to perform such other operations as may be necessary for 'restoring the same to an equal state of strength and sufficiency 'to that in which they were before the defenders began their operations.' The Dean of Guild remitted to several persons of skill, on different occasions, to examine and report 'whether and 'how the tenement in question can be rendered equally firm and 'strong as before the operations of the defenders, without re- 'placing in all respects the parts of the tenement removed by the 'defenders;' and also, 'whether the tenement can be restored to 'the same state as formerly, by rebuilding the brick bearing par- 'tition removed by the defenders; and whether the said opera- 'tion would now be expedient or proper, in the existing state of 'the tenement, with a view to its sufficiency.' The reporters stated, that the restoration of the wall could not produce security, and that they could scarcely see any possibility of restoring the

tenement to its original state; but they suggested certain measures which they considered would have the effect, so far as practicable, to do so. The Dean of Guild ordained 'the defenders forthwith to execute all the operations recommended in the successive reports of the several inspectors as necessary to restore the tenement in question, so far as practicable, to the state in which it was prior to the unwarrantable alterations made by the defenders.' Of this judgment the Society complained by bill of suspension, on the ground that they had such a legal vested interest in the wall and joists as entitled them to prevent M'Lauchlan and M'Keand from injuring them, and that they were not bound to accept of any substitute for the wall and joists, the more especially as the inspectors did not report that the proposed operations would produce absolute security. The Court, on the report of the Lord Ordinary, remitted to two architects in Edinburgh 'to visit and inspect the premises, and to report to the Court their or his opinion as to what is most proper to be done, without regard to expenses, in order to put the complainer's property into a state of absolute security.' A report was accordingly lodged, suggesting the erection of an additional number of iron pillars, in a particular mode, and stating that these would 'place the property in the best state of security of which the defenders' operations can now admit it to be.' The Court remitted to carry the operations into execution forthwith, in the most efficient manner, and without any regard to the expense which would be thereby incurred, and which were to be paid by M'Lauchlan and M'Keand.

*Suspensers' Authorities.*—2. Stair, 7. 6; Ersk. 2. 9. 11; Anderson, June 20. 1799, (12881); Reid, Nov. 16. 1699, (Ap. No. 1. Property); Sharp, Feb. 5. 1800, (No. 3. R.)

*Chargers' Authority.*—Elder's Trustees, March 10. 1824, (ante, Vol. II. No. 725.)

J. FORMAN, W. S.—HUNTER, CAMPBELL, and CATHCART, W. S.—  
Agents.

MAGISTRATES OF KIRKALDY, Petitioners.—*Cuninghame.*

No. 358.

*Burgh Royal.*—Held unnecessary for a town-council to have the sanction of the Court in changing their place of meeting.

THE Magistrates of Kirkaldy presented a petition, stating that they had found it necessary to change the place at which they were in the habit of holding the meetings of the council; and that as they proposed to remove to more commodious apartments within the burgh, they were desirous to have the authority

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H.

of the Court for doing so. The Court being of opinion that no such application was necessary, and that it might be productive of injurious consequences to give any sanction to it, refused it as unnecessary.

J. STUART, W. S.—Agent.

No. 359.

MARGARET CARLING, Pursuer.—*Cockburn—Maidment*.  
R. CAMPBELL and J. CRYSTAL, Defenders.—*Shaw*.

*Poor—Mandatory*.—Held that a pursuer on the poor's roll, and residing beyond the jurisdiction of the Court, is not bound to sist a mandatory, who shall be liable in expenses, if awarded.

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Lord Eldon.

H.

CARLING, who resided in England, having obtained the benefit of the poor's roll, raised an action against the defenders, who pleaded as a preliminary defence, that she was bound to sist a mandatory in the usual form. She was accordingly appointed to do so, and she sisted her agent as mandatory, but under protest that he should not be liable for the expenses, in the event of decree for them being pronounced against her. This being objected to, and the Lord Ordinary having ordained her to sist a mandatory without any such limitation, she reclaimed to the Court, and contended that, as she was upon the poor's roll, she was entitled to sist a mandatory in the terms proposed by her. To this it was answered, that it was a general rule, that all persons residing beyond the jurisdiction of the Court were bound to sist a mandatory, to the effect of diligence being done against the mandatory, in the event of decree for expenses being pronounced; that the poor's roll bestowed certain privileges which were of a precise and known character, but that it did not embrace any such privilege as that demanded by the pursuer; and no such privilege had hitherto been recognised. The Court altered the interlocutor, and allowed the mandatory to be sisted in the terms proposed.

J. M'GOWN,—E. LOCKHART, W. S.—Agents.

MAGISTRATES and TOWN-COUNCIL of KINGHORN, Petitioners. No. 360.

—*Nextes.*

*Burgh Royal.*—Court authorized meetings for the purpose of electing a delegate, member of Parliament, magistrates, &c. to be held in a room in a burgh, while a new gaol and court-room were building.

By the set of the burgh of Kinghorn, the election of the different magistrates and councillors is directed to be made in the tolbooth. This building having become ruinous, the magistrates &c., while a new one was in course of being erected, hired a room to be used as a court and council room, and for the purpose of elections; and they applied to the Court to have this room legalized as a council and court room, and to authorize the magistrates &c. to meet there to elect magistrates, a delegate member of Parliament, councillors, &c. until the new gaol be completed, and also to obtain power to transmit debtors, presented to them for incarceration, to a neighbouring gaol. The Court granted the prayer of the petition.

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2d DIVISION.  
M.K.

RITCHIE and MILLER,—Agents.

J. KYD, Petitioner.—*Moncreiff*—*A. Murray.*

No. 361.

J. FERGUSSON, and J. WALKER his Agent, Respondents.—

*Fullerton*—*Makgill.*

*Inhibition—Law Agent—Mandate.*—Inhibition having been used nimiously and oppressively by an agent, without a mandate from his client, who was furth of Scotland, the Court recalled it, and found the agent, as well as his client, liable in expenses.

FERGUSSON having been sequestrated, Kyd, who was a copartner with him in some adventures, lodged a claim for £5000, and Fergusson obtained his discharge on a state in which Kyd appeared as a creditor to the extent of about £4000. Subsequently to this, the trustee alleged that Kyd owed a large balance to the estate; but a committee of the creditors having reported that no such claim lay, their report was approved by a general meeting, and a complaint against this resolution of the creditors was dismissed by the Court. A summons was then raised against Kyd in name of Fergusson, concluding for £20,000, and stating the grounds of debt in a very vague and indefinite manner. Inhibition having been used on the dependence, Kyd presented a petition for recall, on the grounds that the diligence was nimious and oppressive, and also that it had been used by the agent without a mandate from Fergusson, who was furth of Scotland, and had

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F.

no domicile in this country. Service of the petition was ordered on Walker, the agent, who admitted that he had no written instructions, but alleged that he had been verbally directed by his client to use the inhibition. The Court unanimously recalled the inhibition, and found Fergusson and Walker jointly liable in expenses.

**LORD GLENKEL.**—An application for letters of inhibition is a judicial procedure incidental to the process. The bill comes in place of a summons, and the fiat ut petitor is in fact a decree; and to warrant this, there must be a mandate. Besides, in a strong case like this, where the libel is evidently such as must be dismissed at once, inhibition used on it might be recalled on the merits.

**LORD PITMILLY.**—There are various grounds of recall. The want of a mandate is of itself sufficient. But, besides, the action is against the positive resolutions of the creditors, and after Fergusson has obtained a discharge, on a state in which Kyd stands as a creditor for nearly £4000. The summons, too, is most vague and indistinct, and cannot be allowed to form the foundation of diligence.

**LORD ALLOWAY.**—If no diligence had been used, it might have been enough to have produced a mandate when the action was called in Court; but an agent is not entitled to take out diligence without a written authority, and the want of that is alone a sufficient reason for recall, and I think the agent ought to be subjected in expenses. Even if Fergusson were in this country, I doubt if he could proceed without the consent of the creditors.

**LORD JUSTICE-CLERK.**—I never saw a more unjustifiable use of diligence. The summons is most vague and indistinct, and does not mention a single circumstance from which the claim is alleged to have arisen. The want of a mandate is also completely fatal when the party is out of the country; and holding the agent to have had no authority, he must be found liable in expenses, conjointly with his client.

J. T. MURRAY, W. S.—J. WALKER,—Agents.

No. 362. **J. MABERLY and COMPANY, Pursuers.**—*Moncreiff—Buchanan.*  
**BANK OF SCOTLAND, Defenders.**—*Cochburn—Walker.*

**Process.—Expenses.**—Competent to award to a pursuer expenses prior to an appeal to the House of Lords, who had reversed a judgment of absolver, which found expenses due to the defenders.

Mar. 11. 1836.

2d Division.  
F.

The judgment mentioned ante, Vol. I., No. 406, (which, besides annulling the Bank of Scotland, found them entitled to expenses of process,) having been taken to appeal, was reversed by the

House of Lords, and the cause remitted, to allow a proof, but without any finding as to expenses. A condescendence was accordingly given in by Maberly and Company, to which the Bank lodged answers, and a proof was allowed; but no evidence having been led by the Bank, the Court decerned against them in terms of the libel,—Maberly and Company, and their agent, lodging a bond of guarantee, in the event of any demand being made on the Bank on the halves of the notes which were lost, and paying the expense of re-issuing new notes. A motion was then made on the part of Maberly and Company for the expenses of process in this Court, both prior and subsequent to the appeal. The Bank objected, that so far as regarded the expenses prior to the appeal, it was incompetent to award them; but the Court unanimously found Maberly and Company entitled to expenses, both prior and subsequent thereto.

**LORD JUSTICE-CLERK**.—This Court formerly went on the supposition that there was a plan on the part of Maberly and Company to injure the Bank. The judgment has been reversed in toto, and the Bank did not at once admit Maberly and Company's averments, which made it necessary for them to lead their proof, and having established their allegations, they must have their expenses; and I am of opinion that there is no incompetency in awarding those prior to the appeal.

The other Judges concurred, and Lord Alloway mentioned that the same thing had been done in the case of *Falljambe v. Fullerton*.

R. BURNETT, W. S.—H. DAVIDSON, W. S.—Agents.

Mrs. MILLER and HUSBAND, Pursuers.—*Moncreiff*.

No. 363.

J. B. FRASER, Defender.—*Jeffrey—McNeill*.

*Jury Court—New Trial—Expenses*.—Verdict set aside, and new trial granted, and party who had obtained the verdict found entitled to expenses previously incurred, on finding caution to repeat.

Mrs. MILLER, as representing the deceased Mrs. Robinson, raised an action against Fraser for payment of a legacy left to Mrs. Robinson by his father, to which it was pleaded in defence, that the legacy had lapsed by her having predeceased the testator, who was admitted to have died on the 2d July 1802. An issue was accordingly sent to the Jury Court, to try whether Mrs. Robinson had survived that date; and a verdict having been returned for the pursuer, the defender now moved for a new trial, on the grounds, 1. of *res noviter veniens ad notitiam*, chiefly in

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B.

regard to an important written document adduced on trial by the pursuer, which had been previously sealed up, so that the defender had not access to it, and the paper of which, they alleged, must necessarily, from its structure, have been manufactured subsequently to the date which the writing bore; and, 2. That the verdict was contrary to the evidence adduced on trial. The Court allowed the parties to lodge affidavits by 'papermakers and other persons skilled in such matters, as to the allegations regarding the letter founded on.' Affidavits were accordingly given in, but directly contradictory of each other,—the one set deponing that no such paper was or could have been manufactured at the date of the letter,—and the other, that the letter was written on paper such as was manufactured prior to the date which it bore. The Court set aside the verdict, and granted a new trial, but without stating on which ground, and at the same time awarded to the pursuers the expenses previously incurred in the cause, on their finding caution to repeat, 'in case, on the issue of the cause in this Court, they shall order repetition.'

JOHN MACANDREW,—J. B. FRASER,—Agents.



# THE CASES

DECIDED IN

## THE COURT OF SESSION,

SUMMER 1826.

J. CRICHTON, Pursuer.—*D. of F. Cranstoun—Moncreiff—Whigham.* No. 364.

CRICHTON'S TRUSTEES, Defenders.—*Jeffrey—Fullerton—Cockburn.*

*Traitement—Trust—Personal Objection.*—Held,—1.—That a bequest to trustees was valid, by which a testator declared, that 'it is my wish that such remaining means and estate shall be applied in such charitable purposes, and in bequests to such of my friends and relations as may be pointed out by my said dearly beloved wife, with the approbation of the majority of my said trustees;'—2.—That the nearest of kin, although appointed a trustee, and deriving benefit from such deed, was not barred from objecting to it, having acted under protest.

THE late James Crichton of Friar's Carse, a native of Scotland, after making a large fortune in India, settled in this country, and purchased lands to a considerable extent. On the 12th of November 1821, he executed a trust-disposition and deed of settlement in favour of his wife, of his brother the pursuer, and several other persons, as trustees for various special purposes; and, inter alia, for payment of legacies to different individuals, for conveying to the pursuer certain lands, and bestowing on charitable institutions, which he described specifically, certain sums of money. After these special bequests he introduced this clause:—'And in regard I have not yet determined in what way and manner the further distribution of my means and estate shall take place, I hereby reserve to myself power and liberty to make such distribution, at any time preceding my death, either in holograph instructions to my said trustees, to be executed informally, with-

May 12. 1826.

1st Division.

Lord Alloway.

8.

‘ out the usual solemnities, or by a formal deed of instructions relative hereto ; and in whatever way these instructions may be conceived, I hereby declare that the same shall be as valid and effectual, and shall be as much deemed and taken as a part of these presents, as if the same were herein verbatim engrossed : And also declaring, that if my heir-at-law for the time being, or next of kin, shall attempt to quarrel or impugn these presents, or the future instructions to be given by me to my said trustees, then I hereby declare that he, she, or they shall forfeit all right and benefit to any provision out of my estate that may be conceived in his or her favour, in virtue of these presents, or of any future instructions which I may give, as aforesaid ; declaring that in the event of the said trustees, by death or non-acceptance, being reduced to two in number, before the purposes of this trust shall be fully accomplished, they, or the survivor of them, are hereby empowered to assume two more trustees to aid them or him in the execution of the same, who shall have all the power and privileges herein conferred upon the trustees appointed by me, equally as if their names had been herein engrossed.’ On the 20th of the same month he executed a codicil, in which, after bequeathing some additional legacies, he declared, ‘ That, in the event of my failing to make a distribution of my means and estate which shall remain after fulfilling the purposes before specified, either by holograph instructions, though not formally executed, or by a formal deed of instructions, which I reserve to myself full power to do, then it is my wish that such remaining means and estate shall be applied in such charitable purposes, and in bequests to such of my friends and relations, as may be pointed out by my said dearly beloved wife, with the approbation of a majority of my said trustees ; and in the event of her decease, or entering into a second marriage before such application shall have been pointed out and approved of as aforesaid, then I hereby empower the majority of my said remaining trustees to make the application in the way and manner they would conceive to be most agreeable to my wishes, if in life.’

About two years thereafter, Mr. Crichton died without making any more explicit declaration of his will, and without any family. The trustees, including the pursuer, accepted of the office ; and the lands appointed to be conveyed to the pursuer were accordingly disposed to him. He attended a meeting of the trustees, at which the widow intimated her purpose to exercise the power bestowed on her of assigning a portion of the funds in favour of a friend ; but the pursuer at the same time announced that it was

his intention, as his brother's next of kin, to dispute the validity of the will, in so far as related to the residue of the funds. Thereafter he brought an action of declarator, in which, after stating 'that the said James Crichton, by the foresaid trust-disposition and settlement, has not in any manner disposed of the residue of his means and estate, after answering the special purposes expressed in the trust-deed, but has merely referred to some deed to be afterwards executed by him for that purpose; and that the said codicils do not contain any such certain and definite appointment as to be legally effectual for the disposal of the said residue, but that the words or clauses of the said codicil, above recited, of date the 20th of November 1821, having an apparent reference thereto, are so vague, indefinite, and uncertain, that they do not contain the legal expression of any precise will or intention of the testator with regard to the disposal of the said revenue, and therefore are totally ineffectual for that purpose; and that, in consequence thereof, the said residue must belong to the said pursuer as the nearest of kin of the said James Crichton.' He therefore concluded that it should be found and declared, 'that the said residue of the trust-estate, in the hands of the said trustees, has not been disposed of by any valid or legal declaration of the will and intention of the testator; and that the words or clauses of the said codicil above recited, of date the 20th of November 1821, are not effectual in law for this purpose, but must be held to be void and of no effect, in respect of their vagueness and uncertainty;' and that they therefore belonged to the pursuer, as nearest of kin, and that the trustees should be ordained to count and reckon accordingly. In support of these conclusions he contended,—1. That, in order to exclude the natural heirs, a testator must exercise and declare his own will in a clear and explicit manner, otherwise he will be held to have died intestate; but that in this case no such will had been expressed, and that, instead of declaring what his own will was, Mr. Crichton had authorized his trustees to make a will for him.—2. That it was incompetent by the law of Scotland for a testator to delegate his will to another.—3. That the expression of his wish that his 'remaining means and estate shall be applied in such charitable purposes, and in such bequests to such of my friends and relations as may be pointed out by my dearly beloved wife, with the majority of my said trustees,' rendered the disposal of the funds altogether vague and uncertain, and did not vest in any particular person, or corporation, or institution, any right to call the trustees to account, so that they were thus absolutely uncontrolled, and might dispose

of the funds as to them seemed most advantageous for themselves; and that the distinction between the present case and that of *Hill v. Burns* consisted in this, that in the latter the testator had limited the disposal of his funds to charitable institutions established or to be established in Glasgow or its neighbourhood; whereas here there was no limitation whatever. In defence the trustees pleaded,—1. That the pursuer was barred from objecting to the deed, because he had accepted of the office of trustee, had obtained possession of lands by virtue of it, and had not dissented from the exercise of the powers which the widow had announced it was her intention to carry into effect;—and, 2. That although the testator had not specified the particular charities and friends and relations on whom he wished the funds to be bestowed, yet he had pointed out and described the general class of objects and individuals in whose favour they were to be conveyed, and had limited the trustees accordingly; that while he had done so, he had at the same time conferred a power or faculty on his trustees of selecting out of that class the specific objects or individuals to be favoured, and of fixing the sums to be given to each; that it was perfectly competent to confer such a power on a third party, and therefore it was the will of the testator, and not of the trustees, which was to be carried into execution; and accordingly this principle had been recognised in many former cases, and particularly in that of *Hill v. Burns*. The Lord Ordinary having reported the case on informations, the Court, after a hearing in presence, and after having repelled the objection to the title to pursue, assoilzied the trustees, but found that the expenses of both parties were to be paid out of the trust-funds.

**LORD BALGRAY.**—I have no affection for deeds of this description; but we must give effect to the will of the testator. The law permits a party to dispose of his property as he thinks fit, and he may leave that disposal to be exercised by another. If there were any doubt upon the subject, we would be bound by the decision of the case of *Hill v. Burns*, which is directly applicable, and has been affirmed by the House of Lords.

**LORD HERMAND.**—I am also of opinion that the deed is effectual, and that judgment must be pronounced in favour of the trustees.

**LORD CRAIGIE.**—It appears to me, that in deciding this case we must be regulated by the same principles which were applied to that of *Hill v. Burns*. Indeed that was a stronger case for the plea of the pursuer, because it was evident from the correspondence that the suggestion as to the disposal of the funds did not originally proceed from the testatrix, but from one of the trustees, and that she had just given effect to the views entertained by him.

Besides, the words were equally general, and, in point of principle, there seems no distinction. That case is therefore a direct authority, and as it has been affirmed in the House of Lords, it is scarcely necessary to say any thing more upon this case. In point of principle, however, it appears to me that, independent of that authority, effect must be given to the will. The right of property consists in the power of disposing of it in any manner that is not inconsistent with the public law. A proprietor may dispose of what belongs to him by an irrevocable deed, in favour of any one, with a power or recommendation to bestow a part in charity, or in acts of kindness to friends and relations; or he may convey his property to trustees, to be employed in any way that they may think fit, provided it be not unlawful, or even for behoof of persons not known, or not existing at the time; as, for example, the heir-male or female under an entail made or to be made. In such a case, the granter would be entitled to bring an action against the trustees, if they deviated from the purposes of the trust; but he could not do so to the effect of recalling the trust, or having it found that it was not binding, as being inextricable. The answer would be, that a power had been bestowed upon the trustees which they alone were entitled to exercise; and Courts of Law were not entitled to interfere, unless these trustees acted plainly in opposition to the trust, or fraudulently. If this be true as to an irrevocable deed granted *inter vivos*, it must be equally so as to a trust-settlement *mortis causâ* rendered irrevocable by the death of the granter; for it certainly cannot be said that his heir has more power than he himself has. I therefore think that this action has been both prematurely and incompetently brought. The proprietor here, from circumstances known to himself alone, and from having confidence in the judgment and integrity of the trustees, has given to them a power of distribution among a certain class of objects and persons; and unless it could have been shown that they had either done, or were about to do, what was wrong and inconsistent with his will, the Court could have no right to interfere. It appears to me that the objects of the trust are sufficiently defined, so as to recognise its general efficacy, and to assuage the trustees from the present action; and they are declared in such a manner as to enable intelligent and upright trustees to fulfil the testator's purpose. That purpose is directed to the bestowing of the funds, 1. On persons in an indigent situation, meaning thereby not only those who would otherwise be supported at the public expense, but who must be considered as indigent according to their rank in life; 2. On persons known to the trustees to have been on terms of friendship with the testator; and, 3. On the relations of the deceased, whether remotely or nearly connected with him, and that according to the discretion of the trustees. But even if one or two of these pur-

poses had not been sufficiently defined, the will quoted *ultra* would have remained quite effectual. In support of these views there are numerous decisions of the Court, and therefore it appears to me that judgment must be pronounced in favour of the trustees.

**LORD GILLIES.**—I have great reluctance to sanction deeds such as this; but, after the decision in the case of *Hill*, I am afraid we must give effect to it. Were it not, however, for that decision, I would have great doubts as to the validity of this testament. I perfectly agree that we must give effect to the will of the defunct; but the question here is, Has he himself expressed what his will really is? The deeds are somewhat of a peculiar nature. In the first place, he states that he had not determined in what manner he was to distribute the residue of his funds, and he reserves to himself the power to make such distribution, by instructions to be addressed to his trustees. Now, if he had died without leaving any such instructions, could it possibly be said that he had made a will as to the residue of his funds? If, for example, a testator were to declare that none of his relations was to succeed to him, and had then died without mentioning who was to succeed to him, could that be regarded as a will? I apprehend not. So far, therefore, as regards the trust-deed, I conceive that no *voluntas* has been expressed. There is then a codicil, in which he says, that ‘in the event of my failing to make a distribution of my ‘means and estate, &c., either by holograph instructions,’ &c., then the trustees are to do so and so. Now, it is undoubted that he has left no such instructions, and therefore the question is narrowed as to whether, in the remaining part of the deed, he has expressed his will on the subject. This he has not done, but has left his property to be disposed of according to the will of the trustees; and therefore the simple question is, Whether this testament be valid? Now it appears to me both contradictory and inextricable. He says that the funds are to be bestowed by the trustees on his friends and relations. But it is clear that the trustees cannot lawfully take it to themselves. Now, among these trustees there are his two nearest relations, viz. his widow, and his brother who is his nearest heir, and it is to be presumed that the trustees were his best friends; so that in this way he excludes all those who would naturally, and according to his own words, have a claim on the fund. Were it not, therefore, for the case of *Hill*, I should doubt extremely whether we could give effect to this deed.

**LORD PRESIDENT.**—I cannot distinguish this case from that of *Hill*. Indeed the point was decided previous to it in that of *Buchanan* and other older cases. A will of this kind is not so absurd as perhaps may at first sight appear. A man goes to India in his youth—lives there till he is much advanced in years, and has probably had

little communication with his friends and relations in this country. Being desirous, however, to leave his fortune to them, he grants a power to trustees, who are better acquainted with them than himself, to distribute it among them as they shall see fit; or perhaps he may bestow such a power of disposal on his widow, so as to secure the affection of his relations to her. In this there is nothing irrational or absurd, and it is very much the nature of the case which is before us. I see, therefore, no reason for refusing effect to this deed.

*Pursuer's Authorities.*—2. Ersk. 9. 14; 4. Dig. 8. 2; Pothier on Test. Art. 1. § 1. 2; 2. St. 12. 7; 3. Ersk. 1. 42; 1. Swinh. 22; Sanders, 185. 210; Lovell on Wills, 191; 5. Vesey, 404; 3. Ersk. 1. 23; 3. Ersk. 9. 8; Campbell, June 26. 1752, (7440); Dalzell, March 11. 1756, (16204); 29. and 43. Geo. III. c. 39; 23. Voet, 5. 29; Pothier on Test. 1. 8; 2. Swinh. 463; Dick, Jan. 22. 1758, (7446); Balf. 220; 2. Vea. 51; 1. Brown Rep. 179; Swanson Rep. 201; 9. Vea. 399; 10. Vea. 503; 3. Meriv. 17.

*Defenders' Authorities.*—7. Cujac. 1094; Murray, Nov. 28. 1729, (4075); Buchanan, Dec. 16. 1806, (No. 1. Ap. Service); Campbell, Dec. 16. 1783, (4076); Elch. No. 14. Mut. Cont.; Wharrie, July 16. 1760, (6599); Brown, Aug. 3. 1762, (2318); 7. Vesey, 36. 58. 83; 1. Brown, 11. note; Hill, Dec. 14. 1824, (ante, Vol. III. No. 283). Aff. April 14. 1826, (Wilson and Shaw's Rep. Ho. of L. No. 11.)

A. GOLDIE, W. S.—J. TYTLER, W. S.—Agents.

THE KING'S PRINTERS, Suspenders.—*A. Bell.*

No. 365.

OFFICERS OF STATE, Compearers.—*Sol.-Gen. Hope.*

G. BUCHAN and Others, for the Bible Societies of Edinburgh and Glasgow, Chargers.—*D. of F. Cranstoun—Moncreiff—More.*

*Royal Prerogative—Exclusive Privilege—King's Printer.*—Held,—1.—That the right of printing Bibles, and of prohibiting their importation, belongs exclusively to the King as part of the royal prerogative in Scotland;—and,—2.—That a commission to printers to print Bibles, and prohibiting the importation of them, 'a quibusvis locis transmarinis,' entitles them to prohibit importation from England.

In 1785, the King, by a commission or letters patent under the Union Seal, after narrating a former grant of the office of King's printer: 'Nosque certiores facti de facultatibus et qualificationibus Jacobi Hunter Blair, armigeri, et Joannis Bruce, armigeri, ad promovenqum dictum opus typographiæ conjunctim; et volentes (laudabili exemplo regiorum nostrorum prædecessorum) profectui artis adeo utilis, in ea parte dominiorum nostrorum, favere, benigne percupimus ut tesseram regii nostri favoris in dictos Jacobum Hunter Blair et Joannem Bruce novam donationem dicti officii conferre, solos et unicos nostros

May 12. 1826.

1st DIVISION.

Lord Meadowbank.

D.

‘ architypographos, in illa parte regni nostri Magnæ Britanniæ  
 ‘ Scotia vocat.; idque pro spatio quadraginta unius annorum,  
 ‘ computand. ab et post expirationem diplomatis, pro præsentis  
 ‘ existentis, præfato Alexandro Kincade, pro simili spatio qua-  
 ‘ draginta unius annorum, concessi: Cum plenâ potestate ipsis  
 ‘ Jacobo Hunter Blair et Joanni Bruce, conjunctim, eorumq. hæ-  
 ‘ redibus, assignatis, seu substitutis antedict., præfato munere et  
 ‘ officio, durante spatio antedicto, utendi, exercendi, et gaudendi,  
 ‘ cum omniis proficuis, emolumentis, immunitatibus, exemp-  
 ‘ tionibus, et privilegiis quibuscunq. eidem spectantibus, in quan-  
 ‘ tum cum articulis Unionis, legibusq. Magnæ Britanniæ nunc  
 ‘ existentibus, congruunt; et speciatim solum et unicum privi-  
 ‘ legium imprimendi in Scotia Biblia Sacra, Nova Testamenta,  
 ‘ Psalmorum Libros, Libros Precum Communium, Confessiones  
 ‘ Fidei, majores et minores Catechismos, in lingua Anglicana;—  
 ‘ necnon solam potestatem imprimendi et reimprimendi acta  
 ‘ Parlamenti, edicta, proclamationes, omnesq. alias chartas in  
 ‘ usum nostrorum publicorum in Scotia officiorum imprimendas;  
 ‘ et generaliter omne quod ibidem publicandum erit, auctoritate  
 ‘ regali, imprimendi et reimprimendi: Prohiben. per præsentis  
 ‘ omnes alias personas quascunque, tam nativos quam extraneos,  
 ‘ imprimere vel reimprimere, seu imprimi seu reimprimi in Scotia  
 ‘ causare, vel importare seu importari facere in Scotiam, a quibusvis  
 ‘ locis transmarinis, ullos dict. librorum et chartarum publicarum  
 ‘ supra mentionat., absq. licentia vel auctoritate a dict. Jacobo  
 ‘ Hunter Blair et Joanne Bruce, hæredibus eorum, assignatis  
 ‘ vel substitutis, sub pœna confiscationis omnium talium librorum  
 ‘ chartarumque publicarum ita impress. seu importat. in Scotia;  
 ‘ unius eorund. dimidii ad nos, alteriusq. in usum dict. Jacobi  
 ‘ Hunter Blair et Joannis Bruce, eorumque antedict.’ By vir-  
 tue of this patent, the suspenders obtained letters of suspension  
 and interdict against Manners and Miller and other booksellers,  
 prohibiting them from importing Bibles printed in England.  
 (See ante, Vol. II. No. 254.) Soon thereafter they brought  
 another suspension and interdict against Buchan and others,  
 members of the Bible Societies of Edinburgh and Glasgow,  
 praying to have them also interdicted from importing Bibles from  
 England, so as to protect the suspenders’ exclusive right of print-  
 ing those made use of in Scotland. The Lord Ordinary sus-  
 pended the letters simpliciter, and granted interdict, ‘in respect  
 ‘ of the chargers having failed to point out any distinction be-  
 ‘ tween the matters at issue in the present process of suspension,  
 ‘ and those determined, after the fullest discussion and considera-  
 ‘ tion by the First Division of the Court, in the case of the King’s



'Printers v. Messrs. Manners and Miller and other booksellers in Edinburgh; and that no documents which appear to the Lord Ordinary materially to affect the grounds of that judgment are now founded on which were not before the Court as aforesaid; or that any allegations in point of fact are made by the chargers, different from those which were made in the same case before the Court.' Buchan and others reclaimed; and the case of Manners and Miller having been in the mean time appealed, and a doubt having been expressed in the House of Lords as to the royal prerogative in Scotland being sufficient to authorize the patent which had been granted, the Court ordained the Officers of State to be called as parties, and appointed a hearing in presence. In relation to this point, it was contended on the part of Buchan and others, That although originally the right of printing was *inter jura regalia*, yet this was now altogether exploded; that the royal prerogative in England rested on various grounds, and particularly, first, that the King was there the Head of the Church, and that this translation had been issued under his Majesty's authority, and enjoined to be read in churches; second, that the present translation of the Bible had been made by the directions and at the expense of King James, whereby a copy-right had been vested in him and his successors; and, third, that this privilege had been sanctioned by long usage: whereas, in Scotland, the King was not the Head of the Church—had no power to prescribe any form of religious worship, or any particular books to be made use of in churches—that the translation of the Bible had not been authorized or made by the King of Scotland, but was to be regarded as the translation of a foreign Prince, and that there had been no use so uniform as to found such an exclusive right; and that such being the case, the King had no authority to prohibit the importation of that translation into Scotland. With regard to the extent of the right bestowed on the suspenders, and supposing that the King had the power to bestow it, they contended,—1. That the right conferred was merely that of printing, and not of selling;—and, 2. That the prohibition against importation was directed only against books brought '*a quibusvis locis transmarinis*,' which could not apply to England, the more especially as the former patents prohibited importation '*a quovis loco extra illam partem regni nostri Magnæ Britanniae Scotia vocat., aut a locis transmarinis*;' whereas the present one had been limited to places beyond sea. To the plea as to the royal prerogative it was answered, that the King, both as the Chief Civil Magistrate, and as the Head of the National Church, in relation to the preserving and supporting of religion pure and entire, had the right, and it was his peculiar duty, to pro-

tect the religion of the country by publishing, either by himself, or by the aid of persons to whom he chose to delegate his authority, those books which contained the doctrines of religion, and above all the Holy Scriptures; that such a right and duty must exist in the First Magistrate, wherever religion formed part of the law of the land; that, accordingly, this prerogative was supported by long and inveterate usage; and that the present translation of the Bible had been received and recognised as containing the true doctrines of our religion, and therefore the King, in relation to Scotland, was entitled to appoint printers to print that translation, and, as a consequence, to prohibit the distribution of any others than those which were so printed. With regard to the extent of the right acquired by the suspenders, they maintained,—1. That the Crown having delegated to them the right of printing, this necessarily carried with it the correlative right of preventing the interference of others, and consequently the privilege of original sale;—and, 2. That the prohibitive clause, being intended to protect the right, could not be construed so as to restrict it; and that even if it were so limited, the only consequence would be,—not that the right of importation was vested in the chargers, but that the prerogative to this extent remained in the Crown. The Court, by a majority, adhered to the interlocutor, but of consent recalled the interdict, in *hoc statu*, so far as regarded the Book of Common Prayer.

**LORD HERMAND.**—I have heard nothing which has at all induced me to alter the opinion I formerly gave in the case of *Manners and Miller*. There has been here, no doubt, a most unexpected and unfounded attack made on the prerogative of the Crown. It is admitted that the King has the sole right of printing proclamations and acts of Parliament, and that the principle upon which he enjoys this prerogative is in order that they may be preserved and published in a pure and correct state. But although this be admitted, yet we are told that that which is our guide in this world and towards the next, is to be under no protection whatever, and that such editions of it may be published as any one may think fit. This, however, is perfectly untenable; and if the purity of the Bible is to be maintained, it must be by the King, who is the Head both of our civil and religious establishments. It is not only his right, but it is his duty, to preserve the purity of the Scriptures. In this country the King has the same power as in England as to civil matters touching the religious establishment. His prerogative rests not on an act of Parliament, but on the radical nature of his office, and accordingly it has been recognised in the Confession of Faith. To the extent there specified, he is the Head of the Church. The translation of King James was as much received in

Scotland as in England, and there appears to be equally as much authority for its reception in the one country as in the other.

**LORD CRAIGIE.**—It appears to me that by the terms of the Union, by our statutes, and by the decisions of our Courts, there is an exclusive right established in the Crown to print and publish Bibles. There has also been a continuous possession, and some of the more early patents were ratified by statute, and the right thereby recognised. Indeed the right of printing was originally part of the royal prerogative, not only in this, but in every other country in Europe; and although it has since been limited, yet it still exists so far as regards the Bible. Besides, it is part of the law and constitution of Scotland, that the Crown should have the same power in printing Bibles which it has of printing acts of Parliament. In regard to the nature of the right conferred on the suspenders, if there was only a penalty to be inflicted for importing, perhaps they could not exact more than the penalty; but where there is an express prohibition, effect must be given to it. Indeed the cases of Bell and Bradfute and Mannors and Miller fix this point.

**LORD BALGRAY.**—There are two questions here: first, what is the extent of the prerogative or right of the Crown; and, second, supposing that there is such a right, how far it has been delegated. In relation to the first point, I hold that the King enjoys the prerogative in question, and this not merely as a matter of right, but as a duty, as the First Magistrate of the State. In every community there must be certain rights vested in the First Magistrate, which are not so much for the benefit of himself as of the public, and hence arose the *jura regalia*. These are not the patrimony of the Crown. They are rights which it is his duty to exercise equally as much as the subject is bound to give obedience to the law. As First Magistrate of the State, he is protector of the laws in general, and is bound to publish them. But religion is part of the law of the country, and he is bound to protect every one in the exercise of it, and to make all the subjects aware of what it is. This right and duty are recognised by various statutes, by the Confession of Faith, and forms part of the coronation oath. Having this right, the next question is, whether he has the power of prohibiting the importation of Bibles from other countries. This he must have on the same principle, and accordingly he has all along exercised it, and his patents have been sanctioned by acts of Parliament, by acts of the General Assembly, and by decisions of the Courts of Law. Now, such being the case, it may be asked, What is the Bible which the King is so bound to print and publish? This is a question more of fact than law, and it is impossible for any one to doubt that it is the edition which has been made use of in this country for a long series of years. But the right of the King is not limited to the English edition. It is a consequence of the duty imposed on him of preserving the purity of the sacred text, that the printing of any of those editions to be

made use of in this country shall be intrusted to him alone, and that whether they be in Hebrew, Greek, or Gaelic. The only other question therefore is, What is the extent of the right bestowed on the suspenders? At first I had some difficulty, from the prohibition being directed alone against importation *a locis transmarinis*; but the suspenders have got all the King's rights in relation to this matter; and if he had the right, which he has, of prohibiting importation generally, so must the suspenders. Accordingly this point has been fixed by decisions of the Court.

**LORD GILLIES.**—I agree that there are only two questions here: first, what is the extent of the prerogative; and, second, what is the nature of the right conferred on the suspenders? In England the prerogative has been placed upon three grounds: first, copy-right; second, the King being the Head of the Church; and, third, long use. I observe that Lords Eldon and Gifford place it on the second of these grounds. Now, I thought it had been admitted that in Scotland the King is in no sense the Head of the Church. He can give no form of worship, nor can he prescribe any course of ecclesiastical discipline. In England it has been admitted by all the Lawyers and Judges, that the present translation of the Bible was authorized by the King and sanctioned by the Bishops, and that as such it is read in churches. The Bible which we make use of is the same as that in England; but it does not appear that either this or any other translation was the authorized edition for Scotland. If so, on what ground can the King be entitled exclusively to print an edition which has never been duly authorized? The Bible which is printed by the King's printer contains the Apocrypha, but assuredly this is not sanctioned by the law of Scotland; and if so, how can you find that he has the exclusive power of printing that which is not recognised by law? In Scotland there is no foundation for the privilege as resting on copy-right, or on the Crown being the Head of the Church, and therefore it must rest on usage. But if this be sufficient, it must at least be uninterrupted, and we cannot go back prior to the Revolution. Now, since that period, there has not been uninterrupted usage; and this is proved by an opinion of Sir James Stewart. In relation to the second question, I was against the decision in the case of *Manners and Miller*, and to that opinion I still adhere.

**LORD PRESIDENT.**—All parties agree that the prerogative exists in England, but there is a dispute among them as to its origin. With this, however, we have nothing to do, because it is quite irrelevant as to what is the prerogative of the King in Scotland. It appears to me, however, that he has it in Scotland for the very same reason for which he must have it in England,—that it is essentially necessary to and inherent in the Crown to have a power to maintain and preserve the religion of the State, and it is no matter whether he be Head of the Church or not. Every First Magistrate

(if the power be not expressly placed in other hands) must as a duty furnish to the public the sources whence instruction is to be derived as to the religion of the State; and accordingly we see that among the Jews this was intrusted to the High Priest, among the Romans to the Pontifex Maximus; and indeed it must necessarily be intrusted to some responsible person, by whatever name he may be denominated, wherever there is a national religion. In England the King is both the Head of the Church and of the State. But although he possesses these two offices, they are quite distinct from each other. As the former, he may appoint such prayers to be read in churches as he thinks fit, and may order curates to provide Bibles, as was done by Henry the Eighth. But, as Head of the Church, he has no authority in civil matters, and as such he cannot appoint a printer. It is as Head of the State, and on the same principle that he is entitled to print the statutes, that he has a right to print the Bible. As Head of the Church he authorized the translation, but it is as Head of the State that he is bound to provide Bibles to the public. It is in this latter capacity that he enjoys the prerogative in Scotland. With regard to the question which has been raised, whether the English translation be authorized in Scotland, there cannot be the slightest doubt that it has been recognised and received as completely as it has been in England, and therefore it is the right and duty of the Crown to provide correct copies of it for the public. But this prerogative rests not merely on the nature of the King's office. It has been recognised by various statutes, and by long usage. If, therefore, there be such a prerogative, it necessarily infers a power of excluding all others from exercising it, or any part of it; and this affords a sufficient answer, independent of any other, to the plea which has been raised on the limited nature of the patent; because, if the entire prerogative has not been delegated to the suspenders, it remains vested in the Crown, and cannot be exercised by the chargers. I am also of opinion that the prohibition extends to Bibles in whatever language they may be printed, and to Psalm-Books and the Confession of Faith; but there may be some doubt as to the Prayer-Book. As the suspenders, however, have consented that the interdict shall be recalled in hoc statu as to it, we are not called on to decide that point at present.

*Suspenders' Authorities.*—1551, c. 27; Mack. Obs. 153; 2. Blackstone, 27; 4. Bank. 22. 1; 1. Ersk. 5. 6; 1690, c. 5. and 23; 1700, c. 2; 1702, c. 8; 1708, c. 2; 1707, c. 6; 4. Burrow, 2381; 5. Bac. 599; Rob. Ap. Ca. 197; 1. Burns, Ec. Law, 373; K's. Printer, May 22. 1790, (8316); K's. Printer, Mar. 7. 1823, (ante, Vol. II. No. 254.)

*Chargers' Authorities.*—1663, c. 27; 1701, c. 7; 14. Rymer, 650. 766; 2. Black. 410.

J. BELL, W. S.—W. and A. G. ELLIS, W. S.—Agents.

No. 366. EXECUTORS of J. H. HOUSTON, Pursuers.—*Fullerton—Cockburn—More.*

A. SPEIRS and Others, Defenders.—*Greenshields—Rutherford—Hopkirk.*

*Guarantee—Indefinite Payment.*—A guarantee having been granted for a credit to be operated on for a course of years, by drafts which were to be provided for by remittances six days before they fell due, with a stipulation that the amount of the accommodation should be reduced to a certain extent each year; and the guarantee having fallen after one year, in consequence of a change in the mode of drawing, but the parties having continued to operate on the credit, on the belief that their operations were still covered by the guarantee—*Held*—1.—That remittances made after the date of the guarantee, but some time before any bills drawn under it fell due, were applicable to the liquidation of drafts then due, made and accepted prior to the date of the guarantee.—2.—That the extent of advances never having been reduced by the sureties or the party for whom they were bound, they could not plead the clause of restriction as relieving them of any part of the obligation.—3.—That the party granting the credit had not lost his claim on the sureties, on account of no intimation having been made of the bills not having been duly provided for;—and, 4. That a charge for commission, interest, and portages, fell under ‘damages and contingencies,’ included in the guarantee.

May 12. 1826.

2<sup>d</sup> DIVISION.  
Lord Pitmilley.

F.

IN October 1808, Logan, as manager of the Banton Coal Company, under the firm of H. and R. Baird, applied to the house of the Honourable Simon Fraser and Company of London, of which the late Mr. Houston was a partner, for a credit account to the extent of £7000, and tendered the security of several of his friends by separate letters of guarantee. Fraser and Company agreed to grant the credit, but objected to the form of the letters of guarantee. They consented, however, in the mean time to accept Logan’s drafts to the extent of about £2000, till he should furnish them with a letter in such form as they required; and Logan accordingly, in the course of November and December 1808, sent several drafts on them at three months to the extent of £2000. In January 1809, and before these bills fell due, Logan obtained from the defenders, Speirs and others, the following letter of guarantee, addressed to ‘The Honourable Simon Fraser and Company:’—‘We request you will accept the drafts which Mr. Walter Logan, or any other person by his appointment in writing, may draw on you, from time to time, on account of H. and R. Baird, founders, at the Canal Basin near Glasgow; and we hereby, jointly and severally, agree to guarantee your reimbursements, together with all damages or contingencies that may occur to you from the engagements you may thereby come under to the extent of £7000, for the period of one year from the 31st December 1808, when the amount of

‘ your outstanding acceptances not remitted for is to be reduced to £6000, and thenceforth the sum to be reduced annually £2000, until the whole be liquidated, which will be at the end of the year 1812; until which time, subject to the said annual reduction, this guarantee is to remain in full force;—and we further undertake that the amount of your engagements, from time to time, shall be always provided for by remittances in undoubted good bills on bankers, or other equally good houses in London, not having more than sixty-five days to run; such remittances to come to hand at least six days before your acceptances, for which they are intended to provide, shall fall due.’—This guarantee was, on the 20th of January, transmitted to Fraser and Company by Logan, who at the same time advised them of further drafts on them at three months to the amount of £1100. Fraser and Company then returned the previous letters of guarantee; and in the month of February following, and when the first set of drafts were about to fall due, Logan made remittances to Fraser and Company, amounting to £2000. He continued to operate on the account, and, at the end of the year 1809, the balance due to Simon Fraser and Company was £7130. At that period, Simon Fraser and Company, in concurrence with Sir John Perring and others, established a banking concern under the firm of Fraser, Perring, Godfrey, Shaw, Barber, and Company; and at the same time the house of Simon Fraser and Company changed its firm to that of Simon Fraser, Houston, and Company, but without any change of partners. Notice of this alteration was given to Logan, who was directed to draw on the banking-house, stating in the body of his bills ‘ Value to account with Fraser, Houston, and Company,’ and to continue to make his remittances to that house. Logan accordingly did so till April 1811, when the Banton Coal Company became bankrupt, at which period the balance due to the London house stood at £5729, including £320 of commission, interest, and postages. For this sum the late Mr. Houston, founding on the above letter of guarantee, raised the present action (since carried on by his executors) against Speirs and others, who pleaded various defences, in reference to which the Court (March 4. 1820) found, ‘ That the drafts of Walter Logan, for behoof of H. and R. Baird, upon and accepted by Fraser, Perring, Godfrey, Shaw, Barber, and Company, though authorized by Fraser and Company, or the Honourable Simon Fraser and James Henry Houston, Esq., the sole partners of that company, or of its successors, Fraser, Houston, and Company, are not to be held as entitled to the benefit of the obligation of guarantee granted by

‘ the defenders ;’ but remitted to an accountant to report as to whether the drafts in 1809 had been extinguished by the remittances in spring 1810, or whether these remittances must be held to have been applied to the liquidation of the new drafts in the course of 1810. The accountant accordingly made a report, and the Court found ‘ that there was no specific appropriation of the ‘ remittances made by Walter Logan, after the change of the ‘ firm from Simon Fraser and Company to that of Fraser, Houston, and Company in January 1810, to the drafts which had ‘ been drawn by him on the old firm prior to that period; and ‘ that the defenders are not entitled to derive benefit from the remittances made to the new firm, except in so far as these remittances, when compared, at any one period of the account, ‘ with the drafts drawn by Logan on the banking-house of Fraser, Perring, and Company, had the effect of reducing the balance below the amount for which the defenders were bound, as ‘ the account stood at the end of December 1809; and of new remitted to the accountant to make up a state, showing the exact ‘ balance due by the defenders according to this finding.’ (See ante, Vol. III. No. 126.) On the case returning to the accountant, a question arose, whether, in applying the remittances to the drafts on the banking-house, Fraser, Houston, and Company were entitled to take into account the drafts of which they had received advice, though not yet presented for acceptance, which to a certain extent affected the balance as at the end of the year 1809. The accountant having in his report made up two states of the accounts, framed on the opposite views of the parties on this point, the Court approved ‘ of the principle of accounting adopted in ‘ the first branch of the said report, according to which Mr. ‘ Logan’s remittances to Fraser, Houston, and Company are to ‘ be stated on the dates of his advising them;’ and appointed Cases on the effect of the several interlocutors already pronounced, and on those points of the cause not yet decided. Cases were accordingly prepared, in which it was pleaded for the defenders,—

1. That the first items of the account, for the balance of which this action concluded, consisted of drafts to the amount of £2000, drawn by Logan in November and December 1808, which being accepted prior to the date of the guarantee, could not be covered by it.—
2. That as it has been now finally decided that the remittances in the beginning of 1810, under the new arrangement, were not to be applied in liquidation of the drafts in the end of the year 1809, under the guarantee, these drafts must be considered as not having been provided for; and that it was therefore the duty of Fraser, Houston, and Company to have intimated



this to the sureties, and that, by their having neglected to do so, they had lost their recourse.—3. That as, by the letter of guarantee, the amount of advances was to be reduced £1000 the first year, and £2000 every succeeding year, the amount for which the sureties were liable could in no case exceed £4000 after 1810, and that the pursuers had, in a letter by their attorneys, restricted the claim to that amount;—and, 4. That the sum of £320, included in the balance sued for, being the amount of commission, interest, and postages, did not properly fall under the letter of guarantee. To this it was answered, 1. That if the first items on the debit side of the account were to be deducted, the pursuers were entitled, in like manner, to deduct from the credit side the first remittances in February 1809, which were exactly to the same amount; and being, from their dates, intended to meet the drafts made in the November previous, which then fell due, though not otherwise specifically appropriated, they were entitled to apply them in liquidation of these drafts; the more especially, as none of those under the guarantee were to fall due for some time thereafter.—2. That although intimation to sureties might be necessary in the case of a guarantee of a specific bill, it was not required where the guarantee was meant to cover a long course of transactions; more especially in the circumstances of this case, where both parties were acting under a mistake.—3. That the provision in the letter of guarantee, as to the restriction of the amount of accommodation, was an obligation on the part of the sureties in favour of Fraser, Houston, and Company; and that although the latter would not have been entitled to extend their accommodation to Logan beyond the amount specified at the several periods, had the sureties once reduced the balance to that amount, yet as this had never been done by them, their liability remained to the extent of the sum sued for, as the balance had at no one period been reduced under that amount; and that the attorney's letter founded on was written with a view to a compromise which was not carried into effect;—and, 4. That the terms of the guarantee, binding the defenders to reimburse the sums advanced, 'with all damages and contingencies,' were sufficiently broad to include the charges for interest, commission, and postages. The Court repelled the objections pleaded for the defenders, and decerned for the balance brought out in the accountant's report, as formerly approved of by their Lordships.

**LORD ALLOWAY.**—This case embraces almost every question of importance that can occur under a letter of guarantee; and I con-

less that I entertain doubts on each of the four points pleaded by the defenders.—1. As to the drafts, amounting to £2000 in November and December 1808, they were prior to the date of the guarantee, which cannot therefore apply to them.—2. It was the nature of the guarantee, that after 1810 no more than £4000 could be demanded of the sureties; and if they received no intimation to the contrary, they were entitled to assume that the balance had been reduced in terms of the letter.—3. As to the loss of the pursuers' claim, by neglecting to intimate to the sureties that the drafts in 1809 were not provided for, it is to be observed, that the obligation was not for money advanced, but for bills—that remittances should be transmitted to answer the drafts six days before they fell due; and it was therefore their duty to give notice to the sureties, that they might take measures to secure themselves against loss. It is said, however, that parties were under a mistake, and believed the drafts and remittances after 1809 to be still under the guarantee; but the Court cannot correct this mistake, which does not excuse the pursuers from placing guarantees in such a situation, their obligation being one of the strictest construction in law.—4. The last point regards a small article of commission; and I doubt extremely whether commission can be included under the guarantee. The term 'damages' can only apply to the expenses incurred on bills thrown back; and I doubt whether it can cover a charge for commission.

**Lord Justice-Clerk.**—I differ from the opinion which has been delivered.—1. As to the first point, I hold the same view of the doctrine, that a guarantee cannot cover any transaction prior to its date; but if the first items on the debit side be deducted, there is an equal amount of remittances on the credit side, applicable only to the liquidation of those drafts not under the guarantee, which fall to be treated in the same way, and the balance is thus left unaltered.—2. In regard to the necessity of restricting the accommodation, that is a proceeding which Logan binds himself to do; but it does not follow from his neglecting to clear away the balance, that the parties making the advance are to suffer all the loss.—3. The third point requires a good deal of attention; but I do not think there has been any neglect on the part of the pursuers to bar their claim. The parties were acting under the mistaken supposition that their proceedings were still under the guarantee, and there is no obligation in it binding the pursuers to communicate to the sureties in regard to each particular bill, (as would be requisite to an indorser, or in the case of a special guarantee of such bill); and besides, the sureties were entitled and bound to look into Logan's proceedings;—and, 4. As to the commission, if it is the daily practice of merchants, I should doubt the propriety of excluding it; and the other charges certainly fall under contingencies.

**LORD PITMILLY** concurred.

**LORD GLENLEE**.—If this commission be for recovering payment of the bills remitted to the pursuers to answer the drafts on them, I should think that it fell fairly under the terms of the guarantee; and as to the other points, I am much of the Lord Justice-Clerk's opinion. There is no doubt but that the first items of £2000 cannot be charged against the cautioners, and they must be struck off the account; but there is equally good reason for striking off the first three or four articles on the credit side. If these remittances had borne a special or reasonable application to the drafts under the guarantee, they must have been so applied; but the reverse is the case. They were all made before a bill was drawn under the guarantee, and a great deal too soon to be held as intended by the parties to fall under the guarantee; and of course, therefore, they formed a fund coming into the hands of Fraser and Company, belonging to their debtor, which they were entitled to apply in liquidation of the oldest debt, being also without security.

**LORD ROBERTSON**.—I in so far agree with Lord Alloway, that I cannot hold the drafts in November 1808 to fall under the guarantee, which was not granted till afterwards; for this obligation, being stricti juris, cannot be carried back to prior transactions. It is said, however, that the first four articles on the credit side must also be deducted. This does not appear to me to be a legitimate conclusion; for, not being specially appropriated, I think that we must hold them as made under the guarantee. On the other points, I concur in the opinion delivered by the Lord Justice-Clerk.

*Pursuers' Authorities*.—(1.)—*I. Bank*, 487; *Cochran*, June 22. 1821, (ante, Vol. I. No. 108); *Fell on Guarantee*, p. 99.

*Defenders' Authorities*.—(1.)—*Dykes*, June 2. 1825, (ante, Vol. IV. No. 55);—(2.)—*Bacon v. Chesney*, 1. *Starkie*, 192; *Ewing*, Jan. 7. 1681, (8219.)

**JAMES SMYTH, W. S.—J. G. HOPKIRK, W. S.—Agents.**

**W. TASSIE and COMPANY, Pursuers.—*Moncreiff—More.***

**No. 367.**

**J. MILLER and J. WRIGHT, Defenders.—*Jeffrey—Cockburn—Montreith.***

*Reparation*.—Claim of damages by an inferior tenant on a stream against a superior tenant, for not sending down water agreeably to what was ultimately determined by the Court to be the true construction of the obligations in his lease, held relevant, although the inferior tenant had at one time got the same construction on the lease as that on which the superior tenant acted.

**AFTER** the judgment mentioned ante, Vol. I. No. 553, (which see, as also *Tassie and Company* against *Magistrates of Glasgow*, Vol. I. No. 552,) *Tassie and Company*, tenants of the Subdean mill on the Molendinar burn near Glasgow, gave in the conde-

**May 12. 1826.**  
**2d DIVISION.**  
**Lord Pitmilly.**  
**M'K.**

scendence there ordered of the damage alleged to have been suffered by them in consequence of Miller and Wright, tenants of superior mills, not having allowed the water to come down in terms of their tacks. To the relevancy it was objected, chiefly on the part of Miller, that they had *bonâ fide* followed out what they believed to be the true construction of the clause in their leases; and that Tassie and Company, in their action against the Magistrates of Glasgow as landlords, and in letters addressed to them, had themselves adopted the same construction, and founded their claim of damages against the Magistrates on their having inserted the clause in the leases; but the Court, holding that although these circumstances might be properly pleaded before a jury, they did not preclude a claim for damages, suffered in consequence of the defenders deviating from what was ultimately determined to have been the obligations truly incumbent on them by their tacks, found that there was relevant matter in Tassie and Company's condescendence, and remitted the cause to the Jury Court.

JAMES HILL, W. S.—CARNEGIE and SHEPHERD, W. S.—GIBSON and OLIPHANT, W. S.—Agents.

No. 368. W. PAUL and Others, Suspenders.—*Sol.-Gen. Hope—Cockburn.*  
A. TAYLOR and Others, Chargers.—*Jeffrey—D. Macfarlane.*

*Partnership—Mandate.*—Held,—1. That the partners of a company are bound by the terms of their contract, although the company have announced that they are to cease doing business, but are to remain undissolved, for the purpose of winding up their affairs;—and,—2. That a party who was appointed, by a written commission, to act as manager under a committee of the partners, and to whom no conveyance of the funds had been made, was a mere officer or servant of the company, and had no right to object to their resolutions, or to resist assigning a claim on a sequestrated estate, made by him as manager, although it was declared in one of the resolutions, prior to his commission, that he was to be trustee.

May 13. 1826.

1st Division.

Bill-Chamber.

Lord Balgray.

H.

By the contract of copartnership of the East Lothian Banking Company, it was declared that the superintendence of the business was to be committed to a board of directors; and that they 'should have the ordering, directing, and superintending of the management of the company's business, and the appointment of the officers by whom the same is to be conducted,' &c.; 'and shall also have power to suspend or dismiss such officers when they shall see just cause therefor, and to appoint other persons in their place.' These officers were to consist of a manager, cashier, and accountant. William Borthwick was appointed cashier; and after the lapse of some time he absconded, having

abstracted upwards of £100,000 of the funds of the Bank. The effect of this was to cause the Bank to suspend payments; and after taking the advice of counsel, it was resolved that the Bank should cease to carry on business, but that the company should remain undissolved, with the view of winding up its affairs. Accordingly advertisements to this effect were published; and it was further resolved to intrust the care of the business to a single individual, subject to the control of the board of directors and a committee of management, and at the same time to raise such a sum of money as might be necessary to meet the outstanding claims on the Bank. A loan to a large extent was in consequence obtained from Sir William Forbes and Company, who suggested that the suspender, Mr. Paul, should be the person intrusted with the winding up of the affairs. In compliance with this suggestion a resolution was made, by which it was declared that the said 'William Paul is hereby appointed trustee for behoof of the 'said East Lothian Banking Company.' No conveyance of the funds, however, was made to him; and a commission was granted, by which the directors and committee of management appointed 'the said William Paul to be sole manager and cashier 'for the said East Lothian Banking Company for winding up 'their affairs; giving, granting, and committing to him full power, 'warrant, and commission to levy and collect, realize and convert into money, the whole funds and effects of the company, 'and to receive, sue for, assign and convey, discharge and renounce all and sundry debts and sums of money, heritable or 'moveable, due and addebted to the said company, and in general to subscribe and execute, sign, seal, and deliver all deeds 'and obligations in the premises, which shall be equally binding 'upon us, and the said company and partners thereof, as if the 'same had been subscribed and executed, signed, sealed, and delivered by us and them.' It was, however, further declared that the said 'William Paul shall be bound and obliged to hold 'just count and reckoning, as often as shall be required, with the 'directors and committee of management aforesaid, and to observe and obey the orders and resolutions of the said company at their general meetings, and also the orders and resolutions of the said directors and committee of management aforesaid, given at the regular meeting thereof; and this commission 'and factory shall subsist until the same shall be recalled by the 'directors or committee of management, or any general meeting 'of the company.' Mr. Paul, in consequence of this appointment, entered upon the duties of the office.

After Borthwick had absconded, it was ascertained that he had

been a partner of certain companies in this country, against which sequestration was soon thereafter awarded; and Mr. Spence was appointed trustee. The other principal partner was Bruce Borthwick, the brother of William, who resided in Prussia, and by whom a proposal was communicated to the Bank of paying a certain part of their debt, in consideration of a general discharge. This proposal was entertained by the board of directors and committee of management, and power was given to certain partners of the Bank 'to attend all meetings of the creditors on the sequestrated estates of Bruce Borthwick and Company, and other firms connected with them and individuals, and to vote for entertaining and for the acceptance of an offer of composition to be made by any of the bankrupts or their friends, and to consent to the discharges of the copartnership carried on under the firms of Bruce Borthwick and Company,' &c. ; and, with this view, they consented that an absolute assignation should be granted to these partners, so as to enable them to carry the arrangement into effect. The claim on these sequestrated estates had been made in name of Mr. Paul, and he was required to grant the above assignation to these partners. Being, however, dissatisfied with these and other resolutions on this subject, he, together with certain other partners of the Bank, presented a bill of suspension and interdict, in which it was, *inter alia*, contended, 1. That as Mr. Paul had been appointed trustee, he alone had right to the management of the affairs of the Bank, and therefore he was entitled to resist the execution of the proposed arrangement, and could not be required to grant the assignation demanded.—2. That as the company had ceased to exist, except to the effect of winding up, there no longer remained any connexion between the partners in their social capacity, and they had no other powers in relation to the funds than that belonging to co-owners, so that any one of the partners was entitled to object to the funds being disposed of, except with his express consent. To this it was answered,—1. That Mr. Paul was the mere officer or servant of the company, acting under the directors and committee of management, and had no right to object to the resolutions made by them, or to refuse to grant the assignation which had been demanded;—and, 2. That the original contract remained in full operation, and that the rights of all parties must be regulated by it. The Lord Ordinary pronounced an interlocutor ordering the question to be reported to the Court on Cases, and at the same time stated that he was of opinion, 1. That the partners of the East Lothian Banking Company having, with great propriety, declared that the copartnery shall subsist to the effect of

'winding up the concern, they must still be regulated in their internal actings by the terms of their contract:—and, 2. That the cashier and manager was nothing but a servant of the company, bound to obey their instructions, and that the appointment or commission of Mr. Paul as trustee was qualified and modified in such a way as to oblige him to obey the orders of his constituents, consistent always with the terms and tenor of the contract of copartnery, and that he has no power to exercise his own individual discretion as trustee in that way and manner which a trustee with undiminished powers is entitled to do on his own responsibility, for behoof of each and all concerned.'—The Court, on the same grounds, unanimously refused the bill of suspension.

*Suspenders' Authority.*—(2).—Abel v. Sutton, 2. Esp. 108.

J. and C. NAIRNE, W. S.—CAMPBELL and BURNSIDE, W. S.—Agents.

W. MILLS and Others, Pursuers.—*Forayth—Jeffrey—Moncreiff* No. 369.  
—Cockburn.

ALBION INSURANCE COMPANY and T. HAMILTON, Defenders.—  
*Sol. Gen. Hope—Greenshields.*

*Insurance—Proof.*—When a policy of insurance is not delivered, it is competent to prove by parole the nature of the agreement, and extent of risk insured against.

THE steam-boat Robert Bruce, plying between Greenock and Liverpool, having been destroyed by fire at sea, Mills, &c. the proprietors, demanded from the Albion Fire and Life Insurance Company of London (with whom she had been insured against the risk of fire) payment of the amount insured. This was refused by the Insurance Company, on the grounds, that under the statute 6. Geo. I. c. 18, they, as an English company, were not entitled to take fire risks on vessels while at sea, but only while in rivers, canals, &c., and that, agreeably to this restriction, there was inserted in the policy of insurance of the Robert Bruce a clause suspending the policy while the vessel was at sea. Mills, &c. thereon raised an action against the company and Hamilton their agent in Glasgow before the Judge-Admiral, who having ascertained the company and Hamilton, Mills, &c. brought a reduction of his decree, and, in a condescendence ordered by the Court, averred and offered to prove in support of their action,—1. That, from frequent advertisements in the newspapers, it was well known in Glasgow that the Robert Bruce was not intended to ply in any river but between Greenock and Liverpool.—2. That in

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1819, Hamilton, the agent in Glasgow for the Albion Insurance Company, applied to the owners of the Robert Bruce to insure that vessel with the Albion Company.—3. That the several individual owners gave Mr. Hamilton an order for insurance with the Albion Company against the risk of fire while in port, and plying between the Clyde and Liverpool, paid the premium, and received a memorandum or receipt, stating that an insurance had been effected, without specifying the extent of the risk, or containing any restriction, and bearing that a policy would be forthwith prepared in London, and delivered to the insured on the third Monday of the ensuing month, but that the policies were never delivered to them, although they averred that it was the custom of all the insurance offices in Glasgow, and of the Albion in particular, to send the policies to the several parties insured so soon as they arrived from London.—4. That in transmitting the orders to London, Hamilton wrote to the secretary, ‘ I am not disposed to think that the insurers on the Robert Bruce will be satisfied with the introduction of the clause, ‘ but not while the same “ shall be at sea.” I think that, in addition to the rivers, the Channel ought to be admitted, and this vessel is expressly to ply between Clyde and Liverpool, and will be a great part of her time in the Channel.’ To which the secretary answered, that the company were not entitled to take the sea risk, adding, ‘ If, therefore, the proprietors of the Robert Bruce are not content to hold our policies with the exception complained of, I will thank you to advise me, and we shall then of course consider the insurance not to be renewed after the present;’—but that this correspondence was never communicated to the pursuers.—5. That in 1820 the proprietors of the Robert Bruce determined to effect a joint insurance as a body, and were, as formerly, solicited by Hamilton to insure with his office; and that they accordingly effected an insurance with them to the amount of £5000, in the same way as the individual owners had done, paid a premium of 10s. 6d., and received a receipt, as before, without any restriction of the risk being proposed or mentioned by Mr. Hamilton; that the policy of insurance was never delivered, contrary to what they averred was the practice, viz. that the offices uniformly sent the policies to the insured.—6. That when this insurance was about to expire in 1821, Hamilton’s clerk called at the pursuers’ office with a renewal receipt for another year, which receipt referred to their policy by a particular number, but that the policy itself was never exhibited to them, nor was Mr. Hamilton’s order-book, in which the orders were entered as with the restriction, and that they never heard of the restriction till after the loss of the vessel



in August 1821;—and, 7. That the premium was adequate to the sea risk. Besides denying several of these averments, it was pleaded by the defenders, that the terms of the contract were fixed by the policy, and that it was incompetent to redargue it by parole evidence, more especially as the renewal receipt for 1821, on which the present action was necessarily founded, referred to the policy by its number, so that the parties must be held to have been acquainted with its tenor; and that if such a contract as was alleged by the pursuers had been entered into, it was illegal and void under the 6. Geo. I. c. 18. The Court, without determining the effect of this statute, but considering the averments on the part of the pursuers to be relevant, remitted the whole cause to the Jury Court.\*

The Court were of opinion, that if the policy had been delivered and accepted, it might have been incompetent to lead parole proof in opposition to it; but, as that was not the case, the extent of the risk actually insured against was a proper subject of proof, and ought, agreeably to the provisions of the late act of Parliament regarding actions of this nature, to be remitted entirely to the Jury Court, where it would still be competent to discuss all pleas of relevancy.

D. FISHER,—R. RUTHERFORD, W. S.—Agents.

JOHN GORDON, W. S. Pursuer.—*Sol.-Gen. Hope—Gordon.*

No. 370.

Sir J. INNES, Defender.—*Moncreiff—Maitland—Shaw.*

*Triennial Prescription—Agent and Client—Compensation.*—1.—Circumstances in which a party was barred from pleading the triennial prescription.—2.—An agent who had rendered an account of business held bound by it, and not entitled to claim on a new and enlarged account for the same business;—and,—3.—A client entitled to plead compensation for outlay on behalf of his agent.

MR. GORDON of Avochie, W. S. rendered a business account to Sir John Innes, commencing in 1803, and terminating on the 5th of January 1818; and on the 14th of March 1821 he executed a summons against Sir John, libelling on another account for the same business. In this account he included several articles not formerly charged, increased the rates of charge, and brought it down to the month of April 1818, by means of charges made for letters requiring payment of the account which had been rendered, and for an inventory of Sir John's papers. The accounts, which amounted to £40: 8: 8 $\frac{1}{2}$ , having been remitted to

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\* The Court, at the same time, remitted a somewhat similar action against the Eagle Insurance Company.

the auditor, he struck off the charges for the letters, and reduced the account to £32: 12: 10. In defence against this action Sir John stated,—1. That, from the period when the account commenced, the parties had been in the habit of performing mutual services to each other;—that, particularly, he had for a series of years been employed occasionally to procure loans of money for Mr. Gordon; and as he had no intention of making any charge for his trouble, he had understood that Mr. Gordon was not to avail himself of his professional character to make charges against him; that accordingly no notices of any such claim had been given to him for fifteen years, and therefore he denied its justice.—2. That supposing Mr. Gordon were entitled to make any such claim, he was bound by the first account which he had rendered; and as it terminated on the 5th of January 1818, and the action was not executed till the 14th of March 1821, more than three years had elapsed, and therefore the account was prescribed; and that, even if he were entitled to found on the second account, the charge for the inventory in April 1818 must be disregarded, because, in point of fact, Mr Gordon had no papers in his hands, and he had not been employed to make such an inventory;—and, 3. That if Mr. Gordon were allowed to charge for the services he had performed, Sir John was entitled to be indemnified for the expenses he had incurred in endeavouring to raise money for him. To this it was answered,—1. That there had been no such understanding as that alleged; and that as Sir John was not a professional person, he was not entitled to make any charge;—and, 2. That the employment of Mr. Gordon as agent was proved scripto;—that subsequent to the rendering of the account, and before the action was raised, the claim had been recognised;—that in the first account he had not made all the charges he was entitled to do, in reliance on its being amicably settled;—that three years had not elapsed from the date of the last article, and that the plea of compensation was inconsistent with the defence of the triennial prescription. The Lord Ordinary found that Mr. Gordon was ‘bound by the accounts first rendered;’ repelled the defence of the triennial prescription, and at first allowed a condescendence of the counter claims, but thereafter recalled that order, and also repelled that defence. Both parties having reclaimed, the Court adhered to that part of the interlocutor repelling the defence of the triennial prescription, and which found that Mr. Gordon was bound by the account first rendered; but altered as to the defence rested on the counter claims, and remitted to the Lord Ordinary to receive a condescendence of the amount.

**LORD HERMANS.**—The counter claims of Sir John are well founded, and the services which he performed far exceeded those which had been rendered to him.

**LORD CRAIGIE.**—The points of law which have been maintained in defence are not well founded; and, in the circumstances, the plea of prescription is out of the question. The chief difficulty arises from the lateness of the claim; because, if it had been made known at an earlier period, Sir John would, in all likelihood, not have incurred the trouble and expense which he has done. He is certainly not entitled to charge as an agent; but as he has laid out money on behalf of Mr. Gordon, there is justice in the defence on this point.

**LORD PRESIDENT.**—The plea of compensation is of itself fatal to the defence of the triennial prescription, because it is quite inconsistent with it.

**LORD BALGRAY.**—Sir John is entitled to be kept indemnified. He acted as Mr. Gordon's mandatory; and although he may not be entitled to make a charge on that account, he must be reimbursed for the expenses he has incurred.

**LORD GILLIES.**—Although Sir John could not be at much expense, yet, if he can establish that he actually was so, he is entitled to be indemnified.

*Pursuer's Authorities.*—S. Ersk. 3. 37; Digest. L. 31; De Reg. Jur.; 1. Bank. 19. 24.

**R. BURNETT, W. G.—PH. DANIEL, W. S.**—Agents.

**H. VEITCH, Pursuer.**—*Moncreiff—Greenshields.*

No. 371.

**MAGISTRATES OF EDINBURGH and A. CALLANDER, Defenders.**

—*Sol.-Gen. Hope—Fergusson.*

**C. CUNINGHAM and C. BELL, Defenders.**—*L'Amy—*

*A. Murray jun.*

**Exclusive Privilege.**—Extent of the exclusive privilege of the town-clerk of Leith in preparing the title-deeds of properties situated within the town of Leith.

**MR. VEITCH**, town-clerk of Leith, brought an action of declarator against the Magistrates and town-clerks of Edinburgh, to have it found, that as 'clerk of South Leith he has the sole and 'undoubted right to prepare and to receive the fees, profits, 'emoluments and casualties, for all charters, both original and 'by progress of clare constat, and all other feudal writings, deeds, 'and instruments of every description, to be granted to or by the 'Lord Provost, Magistrates, and Council of the city of Edinburgh, and their successors in office, of property situated within 'the town of South Leith and liberties, and privileges and pertinents thereof;' and he further concluded to have it declared

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that he had right to act as clerk to the city of Edinburgh races, and to receive the emoluments thereof. In defence, on the part of Messrs. Cuninghame and Bell, the town-clerks of Edinburgh, it was stated, that the superiority of Leith was acquired by the Magistrates in 1565; and that although the town-clerk of Leith enjoyed the right of preparing all renewals of investiture within the town of South Leith, whether in favour of heirs or singular successors, in every case where the property was feued out prior to the period when the superiority was so acquired; yet, in so far as regarded original grants and their renewals since that period, the town-clerks of Edinburgh had the sole right to prepare the requisite deeds. On the part of the Magistrates and Mr. Callander it was stated, that while the races were on the sands of Leith, the town-clerk was allowed to officiate as clerk of the course; but that since they had been removed to Musselburgh, the Magistrates did not appoint a clerk, except for the city and member's plates, and that the town-clerk of Leith could have no claim to that clerkship. The Lord Ordinary found, 'that the pursuer, as town-clerk of South Leith, has the sole and undoubted right to prepare and receive the fees, profits, emoluments and casualties, for all renewals of investitures, whether in favour of heirs or singular successors, of property situated within the town of South Leith, and liberties, privileges, and pertinents thereof, in every case where the property was feued out prior to the period when the superiority of South Leith was acquired by the Magistrates of Edinburgh;' but, quoad ultra, assolizied the defenders. Veitch having reclaimed, the Court appointed him to give in 'a condescendence of what he avers and offers to prove to be the boundaries of the burgh of Leith, over which he claims the privileges in question.' He accordingly stated that he claimed the privilege over the town of South Leith, with the links thereof, and that the boundaries were, 'on the east the sea; on the north and north-west the harbour of Leith; and a range of houses known by the name of the Coal-hill and Old Bridge-end; on the west, the water of Leith; on the south, the site of the old ditch of the old fortification; the territory of St. Anthon's, and the road or street leading from the foot of Leith walk to the foot of the Easter and Lochend road; on the south-east, the road running from the foot of these roads along Vanburgh place, Hermitage place, Hermitage and Claremont park, to the end of the wall or dike between Dr. Wood's house of Seafield and the baths, and along said dike or wall to where the gusset of ground betwixt it and the road to Musselburgh ends in a point on the eastern extremity.' The parties having consented to hold

these as the boundaries, the Court found that the pursuer has the sole right to prepare all charters and feudal writings whatever to be granted by the Magistrates of Edinburgh, as to subjects within the above bounds, and held of them as superiors of the barony of South Leith, and to receive the fees, &c. thereof, excepting the King's work and other subjects acquired by the Magistrates by other titles than that as superiors of the barony.

A. ROBERTSON, W. S.—MACRITCHIE, BAYLEY, and HENDERSON, W. S.  
—CUNNINGHAM and BELL, W. S.—Agents.

E. MARSHALL OF M'DIARMID, Pursuer.—*Bell—Anderson.*

No. 372.

ISOBEL M'DIARMID and Others, Defenders.—*Sandford—J. J. Boswell—C. D. Riddell.*

*Husband and Wife.*—Circumstances in which it was held that a wife was entitled, after her husband's death, to revoke a mutual disposition and deed of settlement, whereby she limited her legal rights to an annuity therein specified, to the effect of availing herself of her rights at common law, the deed being considered as truly a donation inter virum et uxorem.

THE pursuer, Elizabeth Marshall, was married to Angus M'Diarmid, innkeeper in Edinburgh, without any antenuptial contract being executed. In the month of March 1813 they made a deed in the form of a mutual disposition and settlement, which proceeded on the narrative, that, 'considering there has been 'no ante or post nuptial contract entered into betwixt us, and being desirous to settle our affairs,' therefore 'we, with mutual 'advice and consent, and I the said Angus M'Diarmid, as taking 'burden on me for the said Elizabeth Marshall or M'Diarmid, 'my spouse, do hereby, under the conditions, reservations, and 'provisions after inserted,' disposed to trustees their whole subjects, heritable and moveable. The purposes of the deed were, inter alia, for paying to his wife, in case of survivance, a liferent annuity of £100, conveying to her the household furniture to the extent of £100, or paying £100 in money; but it was declared that the annuity should, in the event of existing issue, or her second marriage, be reduced to £40. Accordingly, he bound himself to infest her in these annuities alternatively, which she accepted of 'in full satisfaction of all terce of lands, tenements, 'or other heritage, legal share of moveables, and every other 'thing, that I, jure relictæ or otherways, could claim by and 'through the decease of my said husband, or that my next of 'kin could ask or demand of him through my death, in case he 'shall happen to survive me.' In the event of no issue, the whole funds were to be conveyed by the trustees to John M'Diarmid, the father of Angus, and his brother, as substitutes, under the

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burden of certain legacies, partly to her and partly to her relations. The deed then concluded with a reservation to M'Diarmid of 'my own liferent of the premises, with full power to me, 'at any time of my life, and even on deathbed, to alter, innovate, or revoke these presents in whole or in part, and to assign 'or dispose of the heritable and moveable means and estate before 'conveyed, excepting always the foresaid provisions to me the 'said Elizabeth Marshall or M'Diarmid,' &c., 'which are not to 'be altered or revoked without the consent of me, the said Elizabeth Marshall or M'Diarmid, in writing;' and it was declared that the deed should be effectual, although found in the repositories of the predeceasing party.

M'Diarmid died, without issue, in February 1823, when the deed was found in his repositories; and it was said that, during the intervening period, it had been kept entirely in his custody. His personal property amounted to about £4000, and he was invested in heritable subjects producing a rent of £170 per annum. An action of reduction of the deed was then brought by the pursuer, his wife, in so far as her rights were thereby affected, on the grounds,—1. That the provisions there made were in themselves neither rational nor legal, seeing that, *jure relictæ*, she was entitled to one half of the personal funds, being £2000, and to the terce of the heritable subjects, being equivalent to £55 per annum; whereas, by the deed, she was limited to an annuity of £100, liable to be restricted to £40 in the event of her second marriage, and that having been granted *stante matrimonio*, she was entitled to revoke it;—and, 2. That her consent had not been duly obtained, nor her signature legally adhibited. In support of the first of these grounds, (on which she mainly relied, no proof of the other being allowed,) she contended, that although the deed was in the form of a mutual contract, yet the provisions of it being entirely inadequate to the rights thereby sacrificed, it was to be regarded as a donation *inter virum et uxorem*, and therefore she was entitled to renounce it; and, besides, it had never been delivered, and might have been destroyed by her husband, if he had thought fit; so that she was never absolutely secured in these provisions. To this it was answered, that the deed was an onerous contract; that it was not revokable, so far as she was concerned, without her consent in writing, preceding the marriage; that, in implement of it, an heritable bond in security of the annuity had been granted, and that it was not competent to revoke after the death of her husband. The Lord Ordinary reduced in terms of the libel, and the Court adhered.

**LORD HERMANN.**—This must be regarded as a donation *inter virum et uxorem*, from the inadequate nature of the provisions; and the pursuer is therefore entitled to revoke.

**LORD CRAIGIE.**—I have some doubts on this question. In a case which occurred in the House of Lords, it was found that a post-nuptial contract was equally as binding as an antenuptial contract, unless force or special circumstances, inferring fraud or circumvention, were established. If that principle be correct, the deed should more especially receive effect, where it has not been recalled during the life of the other party. Besides, it should always be recollected, that during his life the husband has the absolute command of all his funds, and he might so have disposed of them as to have left his wife without any provision at all. I therefore doubt whether we are entitled to set aside this deed.

**LORD BALGRAY.**—I agree with Lord Hermann, and it appears to me, that so far as the rights of the wife are affected by means of that which is truly the settlement of the husband, she is entitled to renounce, and to avail herself of her common law rights.

The other Judges concurred.

*Pursuer's Authorities.*—*L. Enk. Pr. 2. 18*; Stewart, Nov. 22, 1769, (6100); Douglas, Heron, and Co. July 29, 1783, (11461.)

*Defender's Authorities.*—*M'GIB, Nov. 22. 1864, (5697)*; *Chalmers, July 26. 1710, (6952.)*

CRANSTOUN and ANDERSON, W. S.—N. W. ROBERTSON,—Agents.

JOHN M'DIARMID, PURSUER. — *Sandford* — J. J. Boswell — C. D. No. 373.  
*Riddell.*

ISOBEL M'DIARMID and HUSBAND, Defenders — *Cunninghame* —  
*Ivery.*

*Fraud—Reduction.*—Circumstances in which a deed was set aside, as having been obtained by fraud.

THIS case was connected with the preceding one. The pursuer, John M'Diarmid, was the father of Angus M'Diarmid, who, together with his wife, by a disposition and deed of settlement, conveyed their whole property to trustees; and in particular it was declared, that 'in case the said Angus M'Diarmid 'shall have no issue of my body by the present or any subsequent 'marriage at my death, or afterwards failing, then our heritable 'and moveable means and estate before disposed shall fall and 'belong to the said John M'Diarmid and Catherine Cameron or 'M'Diarmid, my father and mother, and the survivor of them; 'whom failing; to Hugh M'Diarmid, presently residing in: the 'neighbourhood of London; Christian M'Diarmid and Isobel

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‘ M’Diarmid, wife of Daniel Drummond, farmer in Couden near Comrie, my brothers and sisters, equally among them, their respective heirs, executors, or assignees.’ It was also declared, that in case John M’Diarmid should survive his then wife and marry again, his right should be restricted to an annuity of £40. Angus M’Diarmid died in February 1823 without issue, leaving heritable and moveable property to the extent of about £6000, and he had been predeceased by his mother, and by his brother Hugh, and sister Christian. In virtue of this deed, his father became entitled to the whole property thereby conveyed, subject to the burdens therein mentioned. At this time he was upwards of 80 years of age, and it was alleged that he was exceedingly frail, and in the habit of indulging in spirituous liquors. Soon after the succession opened to him, his daughter Isobel, the pursuer, and her husband took up their abode with him, and not long thereafter they caused a deed to be framed by their own agent, in the form of a mutual obligation and agreement, which, after narrating the terms of the disposition and settlement by Angus M’Diarmid and his wife, and that his father had acquired right to the funds thereby conveyed, stated ‘ that the parties to the present deed have arranged and agreed that the said John M’Diarmid shall enjoy an annuity of £40 per annum out of the foresaid funds in lieu and place of the rights that have opened to him by the death of the said Angus M’Diarmid, which shall determine from this date, and shall devolve and belong to the other persons named in the foresaid deed of settlement.’ John M’Diarmid therefore renounced all right to the property, except to the extent of an annuity of £40, in consideration of which his daughter Isobel and her husband bound themselves ‘ to make payment to the said John M’Diarmid, out of the trust-funds, of the foresaid sum of £40 per annum;’ and both parties concurred in requiring the trustees under Angus M’Diarmid’s deed ‘ to pay the said John M’Diarmid out of the trust-funds under their charge the foresaid annuity of £40 sterling,’ and on this deed an inhibition was immediately executed and duly recorded. In this matter, John M’Diarmid was not assisted by any agent, and it was admitted that he had subscribed the deed under the impression that he would thereby be protected against the effects of a reduction of the disposition of his son Angus, which was then threatened, and afterwards brought by his widow. Soon after having executed the deed, he instituted an action of reduction of it on the ground,—1. That it had been obtained by fraud and circumvention; that the fraud was manifest ex facie of the deed, because he was made to renounce a valuable succession for payment of an



annuity of £40, which was to be paid out of the funds belonging to himself, and that it was admitted that he had been induced to execute it under an impression which was not well founded;—and, 2. That the deed having been prepared by the defenders and their agents, and the pursuer being so far advanced in life and extremely frail, and having had no adviser in relation to the matter, he was entitled to be reponed against it. To this it was answered, that the deed was duly and regularly executed, and had been deliberately considered by the pursuer; that the object of his granting it was to prevent himself from being imposed upon by strangers, and tempted to give away the property from his daughter, who was one of the substitutes under Angus M'Diarmid's disposition; that the present action was prompted by a party who alleged that he was a grandson of John M'Diarmid, and who had since induced him to execute a new deed, and therefore the arrangement which had been made was a prudent and rational one, and ought not to be set aside without evidence of specific acts of fraud, of which there had been none adduced. The Lord Ordinary having decerned and reduced in terms of the libel, the Court at first altered, and remitted to receive a condescendence by the pursuer; but thereafter, on advising a reclaiming petition with answers, and a condescendence of the grounds of reduction, they altered, and adhered to the judgment pronounced by the Lord Ordinary.

**LORD HERMANN.**—The deed itself proves the fraud. A succession of £6000 was given up by the pursuer without any consideration on the part of the defenders. It is said, no doubt, that the pursuer was to receive an annuity of £40, but this was to be out of his own funds, so that in truth the defenders were to pay nothing at all.

**LORD BALGRAY.**—I have considerable doubts on this case. We have no evidence as to the amount of the funds, and when you look at the situation in which the parties were placed, I rather think this was a prudent arrangement. All the family of the pursuer were dead except the defender, his daughter. The old man was in his dotage, and the object of the deed seems to have been to protect him against imposition by strangers. If, therefore, he did understand the nature of the deed, any presumption of fraud arising from its terms must be done away. But as it is alleged that there were circumstances of fraud attending the mode in which it was executed, we ought to allow a proof of them.

**LORD CRAIGIE.**—I am of the same opinion. The defenders expressly deny that the deed was unduly obtained; and, on the contrary, allege that it was read to and understood by the pursuer. We therefore cannot refuse a proof. It is no doubt said, that the in-

structions for framing the deed were communicated by the defenders to their own agent, but we know that in many cases there are people who cannot convey their own ideas intelligibly; and, therefore, if the deed was explained to him before subscribing it, I apprehend that this would be sufficient. There appear to me no circumstances on the face of the deed inferring fraud; on the contrary, it seems to have been a proper and prudent arrangement.

**LORD GILLIES.**—I concur in the opinion first delivered. I cannot understand in what the prudence consisted, in the pursuer giving away all his funds for no consideration whatever. Besides, the pursuer was led to execute the deed, under the apprehension that otherwise he would be deprived of every thing by the reduction about to be brought by Angus M'Diarmid's widow. But this was a false impression, and in this consisted the fraud, and it was upon a similar ground that we were mainly induced to set aside the deed in the case of *Murray v. Murray's Trustees*, lately decided.

**LORD PRESIDENT.**—I am entirely of the same opinion. The pursuer was told that he was in danger of losing every thing unless he executed this deed. This was a false pretence, and indeed the very nature of the agreement itself shows that either a gross fraud or gross mistake had been committed.

**J. MALCOLM, — N. W. ROBERTSON, — Agents.**

**No. 374.**    **LORD CLERK REGISTER, Suspender.**—*D. of F. Cranstoun — Thomson.*

**COMMISSIONERS OF EDINBURGH POLICE, Chargers.**—*Moncreiff — Brownlee.*

*Register-House — Police Assessment.*—Held, that the General Register-house is not liable to police assessment.

**May 17. 1826.**    By the police statute of the city of Edinburgh, 52d Geo. III. c. 172, it was enacted that the commissioners should be empowered 'to assess all tenants, occupiers, and possessors of dwelling-houses, shops, warehouses, cellars, vaults, or other buildings, or pertinents thereof, in any sum not exceeding 1s. 5d. per pound of the yearly rent.' But it was declared that this should not extend 'to the royal Palace of Holyroodhouse, or to the houses and buildings in the Castle of Edinburgh, or to the barracks of Queensberry-house, Canongate, so long as it continues 'to be occupied as a barrack for his Majesty's troops.' By the 56th Geo. III. c. 54, it was further declared that the assessment should not be imposed upon 'any houses or buildings erected or 'to be erected for the purpose of public charity, nor upon any

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**Lord Eldon.**

**D.**

‘house or premises occupied or to be occupied by the trustees of the fund for the widows or ministers of the church, and professors of the universities, nor upon any place of public worship, nor upon any building erected or to be erected for the purposes of science or education.’ Enactments of precisely the same nature are contained in the present police statute, 3d Geo. IV. c. 78. No express exception was made of the General Register-house; and the commissioners conceiving that they were entitled to impose an assessment upon it, made a demand in 1813 on the Lord Clerk Register to that effect, but this was not followed up by any proceedings. At last, in 1823, the collector presented a petition to the Sheriff of Edinburgh, stating that the Lord Clerk Register was, for himself and his predecessors in office, in arrear of police assessment to the extent of £757: 18: 4, and praying for warrant to ‘officers of Court to enter the said General Register-house, and to seize and take possession of the goods, furniture, and effects to be found therein, for payment of the rates and assessments due on said building.’ The Sheriff having granted warrant in terms of this prayer, the Lord Clerk Register brought a suspension and interdict, in which he contended, that the General Register-house was not liable to be assessed, 1. Because it formed an integral part of the Supreme Courts of Justice, and although it was accidentally situated at a distance from them, yet it was the depository of their records, and was devoted to the transacting of the greater part of the business there carried on; that it was also the depository of all the public and private records of the kingdom; that accordingly it had always been considered, equally as much as the Courts of Justice themselves, exempt from all general or local taxation; that no fund was provided for the payment of such taxes, and that the mode in which it was proposed to recover payment of the assessment was by seizing on the effects there situated, including, of course, these records;—and, 2. Because it was impossible to include it under the general words of the statute, seeing that it was neither occupied nor possessed in the sense there meant to be expressed; and although there were introduced into the statute the general words ‘or other buildings,’ yet this meant the buildings connected with the houses, shops, &c. there mentioned, and forming ‘pertinents thereof.’ To this it was answered,—1. That the circumstance of the Register-house being made use of for public purposes bestowed no right of exemption, and that accordingly the Post-office, Excise-office, and other public offices, had been always assessed without objection;—and, 2. That as the words of the statute were sufficiently general to include the Register-house, and it was not specified among the exceptions, it must

be held as liable to assessment. The Court, on the report of the Lord Ordinary, suspended the letters simpliciter.

**LORD PRESIDENT.**—This is a serious question. Do the commissioners mean to maintain that the Lord Clerk Register is liable for arrears? and do they mean to say that he is the tenant and possessor of the Register-house? He is a public officer, and as Clerk Register he has no salary; and there is no fund provided for paying any such taxes. Indeed, they tell us that the Parliament-house itself is only exempt *ex gratia*, and they intimate that they may possibly make a claim upon it; and I presume they will do so on the principle that I am the possessor, as being Lord President of the College of Justice. The idea is perfectly absurd; and it is plain that the statute was never intended to apply, and does not apply to such a case.

**LORD HERMAND.**—The act of Parliament neither applies in words nor in spirit.

**LORD BALGRAY.**—The act of Parliament is somewhat peculiarly worded; and I feel considerable difficulty from the other public offices being considered liable.

**LORD CRAIGIE.**—I entertain the same difficulty. The object of the police statutes is to protect all buildings; and all must be liable unless excepted. Now we have many exceptions in the statute, but the Register-house is not among them. On the principle maintained by the suspender, the Sheriff-clerk's offices may be exempt from such assessment; but I apprehend that his plea is not well founded, and that the Register-house is equally as liable as other public offices.

**LORD GILLIES.**—The exceptions in the statute are certainly very extraordinary; for although they include the University and other buildings established for education, yet there is no exemption whatever of the Parliament-house. I apprehend, however, that before looking at the exceptions, we must see whether the Register-house is embraced within the general rule. I am satisfied that it is not.

*Chargers' Authorities.*—*L. Ersk.* l. 54; Bruce, Nov. 28. 1810, (F. C.); *Mikroy*, Nov. 21. 1815, (F. C.)

J. THOMSON, W. S.—R. MACKENZIE, W. S.—Agents.

J. D. MURRAY, Pursuer.—*Moncreiff—Henderson.*

No. 375.

Mrs. MURRAY, Defender.—*D. of F. Cranston—Greenshields.*

*Fee or Liferent.*—By an antenuptial contract, £10,000 had been vested in trustees for behoof of the husband and wife 'in conjunct liferent, and of the survivor of them 'also in liferent,' and for the children in fee; and the husband being bound to secure her a liferent of £400 per annum, and having thereafter purchased, with part of the £10,000, an estate, the disposition of which was taken to himself and wife, 'and 'the longest liver, and their heirs and assignees whomsoever'—Held that the wife had only a liferent of the estate, and that the purchase had been made in implement of the obligation in the marriage-contract.

By an antenuptial contract entered into between the defender, then Miss Catherine Arthington, and Mr. John Murray, her father assigned and became bound immediately to transfer £10,000 of the stock of the 4 per cent. consolidated annuities to certain trustees, 'for the use and behoof of the said John Murray and 'Catherine Arthington, spouses, in conjunct liferent, and of the 'survivor of them also in liferent, and for the use and behoof of 'the child or children to be procreated of their marriage in fee, 'equally among them, in case not otherwise destined by the 'said John Murray and Catherine Arthington, who shall have 'power to do so in such proportions as they may think proper 'by any writing under their hands.' Power was also given to the trustees 'either to continue the said sum in stock, or to uplift or 'otherwise employ the same as they shall see most for the interest and advantage of the contracting parties and their children; 'but, in the event of its being uplifted and otherwise employed, 'they are to secure to the said Catherine Arthington her liferent 'of £400 sterling, which is the present interest of the said capital 'stock.' On the other hand, Mr. Murray bound himself to 'secure to the said Catherine Arthington, in the event of her surviving him, a jointure or liferent annuity, and to provide and 'secure to the child or children of the marriage such provisions 'as may be suitable and corresponding to his fortune and circumstances at the dissolution of the marriage.'

The £10,000 were uplifted, and during the subsistence of the marriage Mr. Murray purchased the lands of Norwood, the disposition of which proceeded on this narrative by the seller: 'In 'consideration of my having sold the lands and others after disposed to John Murray, Esq. younger of Tundergarth, and Mrs. 'Catherine Arthington, his spouse, for the sum of £3000 sterling, as the agreed on price and value thereof, and seeing that 'the said John Murray hath made payment to me' of the price, therefore he disposed the lands 'to the said John Murray and

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H.

‘ Catherine Arthington, his spouse, and longest liver of them, and their heirs and assignees whomsoever, heritably and irredeemably.’ Infestment was accordingly taken in these terms. On the death of Mr. Murray, his eldest son, the pursuer, served himself heir cum beneficio inventarii, and the fee of Norwood having been claimed by his mother, he brought an action of declarator, in which he alleged that the lands had been purchased by means of part of the £10,000 appointed to be secured in liferent; and he concluded to have it declared, 1. That the price of the land formed a part of these monies.—2. That his mother’s right to the estate was merely that of a liferent, and that the fee belonged to him;—and, 3. That the rent of the lands should be held a surrogatum pro tanto of the £400 per annum. In defence she maintained, That as the disposition was taken to her husband and herself, ‘ and longest liver of them, and their heirs and assignees whomsoever,’ the fee was thereby vested in her. To this it was answered, That these terms merely imported a liferent, and that, at all events, as the price formed part of the £10,000 which was to be secured in liferent to her, the deed must be construed in reference to the antenuptial contract, and that the purchase had been made by Mr. Murray in implement of the obligation therein contained. The Lord Ordinary found ‘ that the defender Catherine Arthington’s right and interest in the town and lands of Norwood and others under the disposition libelled on extend only to a liferent, and that the fee or property thereof belongs to the pursuer, as heir cum beneficio inventarii served and returned to his father.’ To this interlocutor the Court, after appointing ‘ the pursuer to give in a condescendence of the source from whence the price of Norwood came,’ adhered.

**LORD PRESIDENT.**—I am satisfied that the money with which this estate was bought formed part of the £10,000 which was to be secured in liferent, and therefore we must construe the clause by reference to the antenuptial contract. Besides, it will be observed that the clause is in favour not of the heirs of the longest survivor, but of *their* heirs, which forms an important distinction.

**LORD HERMAND.**—This money did not belong to the defender at all, and therefore it cannot be said that the price came from her.

**LORD BALGRAY.**—By the antenuptial contract Mr. Murray was under an obligation to secure a liferent to his wife, and therefore he was her debtor. Now, the rule of law is, debtor non presumitur donare; on the contrary, the presumption is, that the debtor intends to perform his obligation. When, therefore, Mr. Murray employed the money conveyed to him by the marriage-contract to buy these lands, we must presume that it was in implement of his

obligation. She was in truth no party to this purchase. If she had been so, it might have been argued that it was an onerous transaction on her part, but she was not so; and I am satisfied that the purchase was made in implement of the contract.

**LORD CRAIGIE.**—The defender by the contract was entitled to £400 per annum, and her husband, in implement of this obligation, made this purchase. If we were to sustain her claim, she would be entitled, in addition, to demand her jointure; but this certainly was not the meaning of the parties. In construing the clause by itself, perhaps she would have right to the fee, had it been taken in favour of the heirs of the survivor; but it is to their heirs, which is different.

**LORD GILLIES.**—If I were to proceed on the deed alone, I would be in favour of the defender. See the doctrine laid down by Erskine, and the case cited by him. But if it be true that the money with which these lands were purchased was part of that vested in the trustees to secure to her a liferent, then the case would be different; because we must rather presume that it was intended to discharge the obligation than to make a gift to her of the fee. On this point, however, I do not think the condescendence sufficiently precise.

*Pursuer's Authorities.*—2. Stair, 6. 10; 3. Stair, 5. 51; Justice, Jan. 23. 1668, (4428); Henderson, Jan. 20. 1790, (4215.)

*Defender's Authorities.*—3. Ersk. 8. 36; Ferguson, June 22. 1739, (4202); Riddle, Nov. 6. 1747, (4203); L. Boyd, Nov. 22. 1749, (4205); 1. Bell, 43.

**R. RUTHERFORD, W.S.—T. JOHNSTON,—Agents.**

**W. MIRBLEES, Pursuer.—D. of F. Cranstoun—Ivory.**

**No. 376.**

**B. MATHIE, Defender.—Moncreiff—Skene.**

*Agent and Client—Professional Liability—Reparation.*—A writer being factor for a number of trustees under a deed of settlement, and having erroneously paid a share of the trust-funds to the nearest of kin of a legatee deceased, without requiring a confirmation, instead of to a party in whose favour the legatee had left a testament, —Held that, as to all payments made after he was aware of the existence of the testament, he was liable to relieve a trustee who had been subjected in second payment, as having himself been in knowledge of the testament; but that, as to prior payments, he was not liable.

**THE** late James Brodie, by his deed of settlement, appointed his sister Mary Brodie, the late William Mirrlees, saddletree-maker in Glasgow, and six other persons, chiefly merchants or tradesmen, to be his trustees, for the management and division of his property. They were directed to lay out a considerable part of it on security for payment of certain annuities, and they were likewise directed to divide the whole residue of his estate, 'together with the capital sums which are to be invested for the

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**Lord Pitmilley.**

**F.**

‘ payment of the foresaid annuities, so soon as the annuities shall cease by the death of the several annuitants, as also the price of the dwelling-house, which I have given in liferent to the said Mary Brodie, and which may be sold by my trustees after her death, but not sooner,’ between his nephews John, James, and William Barr, and his niece Martha Barr, their sister, equally among them, and share and share alike; and failing either of them by death, then to their respective nearest of kin. Mr. Brodie having died in 1791, all the trustees accepted; and, at their first meeting, ‘ considering the state of Mr. Brodie’s subjects and affairs, and that they cannot possibly act conjointly in the management,’ they appointed the late James Mathie, writer in Glasgow, ‘ to be their factor.’ The funds necessary for payment of the several annuities were invested agreeably to the directions of the trust-deed, and the residue of the property, with the exception of the house liferented by Mary Brodie, divided among the four legatees. James Mathie thereafter continued in the management of the trust, drawing the interest of the sums invested, and paying the annuitants, till his death in 1795, when he was succeeded in this, as in his general business, by his brother, the defender, also a writer. There did not appear to have been any express written appointment of the defender as factor, but he simply continued the management of his brother; and in an account rendered by him, he stated, in one lump sum, the whole professional charges and commission of his brother and himself, without any distinction or separation. This commission was allowed at the rate of  $2\frac{1}{2}$  per cent. on the sums recovered, and an additional charge was made for any professional business performed as agent. In 1797, the defender called a meeting of trustees, to lay before them his late brother’s accounts, of which they approved, and fixed the rate of commission to be allowed him as above mentioned. They also gave directions to him to intimate their rejection of a claim made on the estate, and at the few previous meetings which had been held, similar directions as to the estate had been given to James Mathie, the former factor. But after this meeting, there appeared no further entries in the sederunt-book of the trustees of any meetings or instructions given by them to their factor.

In 1799 William Barr, one of the legatees, died, leaving an only son, to whom Mirrlees was appointed factor loco tutoris; and in 1803 John Barr, another of the legatees, died without issue, but leaving a testament bequeathing the whole of his estate and effects to William’s son. At this period all the annuitants were alive; but, in August 1805, Mary Brodie, who had an an-



nuity of £50, and the liferent of a house, died. By this event the capital sum of £1000, and the value of the house, which afterwards sold for £370, fell to be distributed among the parties interested in the residue of the trust-estate. Accordingly, the sum of £1000 was divided in the November following by the defender, but the share of John Barr, who had died without issue, was paid to his surviving brother James and sister Martha, as his nearest of kin. They, however, produced no confirmation as such, and the money ought to have been paid to the son of William, the sole legatee under John's testament, who only received the one fourth share belonging to his father William, which was uplifted and discharged by Mirrlees, as his factor loco tutoris. For payment of part of this fund to one of the legatees, Mathie produced as his authority a mandate from Mirrlees, dated in 1805. The next fund of division was the price of the house, which was distributed in exactly the same manner with the former; but it was disputed whether this distribution was made in December 1805 or in June 1806, which was the earliest date of any of the discharges;—and in regard to the payments to James Barr, the discharges for the shares, both of the first and second fund, were dated so late as May and July 1807.

In the beginning of the year 1806 the defender was employed by William Barr's widow to conduct a process of aliment against her son, and Mirrlees as his factor loco tutoris; and in the pleadings, particularly a paper dated April 1806, signed by the defender as procurator, mention was made of property to which the boy had 'succeeded' by his uncle John's death, and which had been 'left' him by John Barr; and in one of the papers on the opposite side express mention was made of a will. In 1807, by the death of another of the annuitants, a further sum of £300 became the subject of division, which was paid in the same proportions as the former funds, and the discharges for which, as well as for all the previous divisions, bore the amount to have been paid by the hands of Mathie, the factor for the trustees. There was still remaining one other sum of £300, invested for the payment of the only annuitant in life, and this sum Mirrlees, being now the only surviving trustee, called up, and lent to his own son, and he himself thereafter paid the annuity till the annuitant died in 1814, when the sum was divided, and John Barr's fourth share appropriated to Martha Barr, as his then nearest of kin, (James being now also dead,) instead of to his legatee William's son. The defender, however, alleged that this sum was retained by Mirrlees himself in satisfaction of advances made by him to his brother Charles, (who was Mar-

tha's husband,) and he denied that any part of this fund of division passed through his hands, although the discharges produced in process bore, like the former ones, that the amount had been paid 'by the hands of the said Benjamin Mathie,' who is thereby discharged, as well as Mirrlees himself. In the year following, William Barr's son raised an action before the Magistrates of Glasgow against Mirrlees and the heir of another trustee, for having paid away to John Barr's nearest of kin that share of Brodie's funds which had been truly transmitted to him by John's testament. This action was conducted on the part of Mirrlees and M'Intosh by the defender, who signed all the pleadings in the cause, and contended in defence that the capital sums lent out for payment of annuities did not vest in the legatees till the death of the annuitants; and accordingly that John Barr having predeceased them, had no vested right in the funds capable of transmission by settlement; and in one of the papers he stated, 'that the whole business of the trust was performed by Mr. Mathie, who held a factory under the trustees for that purpose;' and 'that Mr. Mathie has always been agent under the trust.' The Magistrates found 'that the evidence adduced afforded reason to believe that the defenders, or at least the defender Mirrlees, if not in the knowledge and under the conviction of the pursuer's preferable right under the settlement of the late John Barr, was at least aware that the said John Barr did not die intestate, but left a settlement; and that the conduct of the defenders, when aware of the existence of the said settlement, in making payment of the said John Barr's share of the residuary legacy bequeathed by his uncle the late James Brodie, to the next of kin of the said John Barr, without ascertaining that the next of kin were in titulo to receive such payments, or to grant valid discharges, by having been deemed and confirmed executors in that character, and found security in common form, is relevant in law to subject the defenders personally in second payment to the pursuer, at least subsidarie.' In regard to the heir of the trustee, the Magistrates afterwards altered, on the ground that 'it was not sufficiently instructed that his father was aware that the late John Barr did not die intestate, but left a settlement;—but they adhered to their judgment so far as regarded Mirrlees; and in an advocacy brought by him to this Court, the cause was remitted simpliciter. On this (the parties to whom the funds had been erroneously paid being unable to repeat the amount) Mirrlees raised the present action of relief (afterwards carried on by his son) against Mathie, as the factor and agent of the trustees. In support of it he pleaded,

that Mathie being a professional man, and acting as the factor and law agent of trustees, who, from their situation in life, could know nothing of the legal doctrines of succession, and who had devolved the whole management on him, was liable for the gross error of holding the trust-fund not to have vested in the legatee, John Barr, on account of his having predeceased the annuitants, and for acting, or at least advising the trustees to act on this erroneous principle in the distribution of the funds; that as to all the payments, he had incurred a liability by paying to John Barr's next of kin, without requiring a confirmation, whereby he would at least have secured the benefit of the usual caution to the trustees; that in regard to the payments made after the action of aliment at the instance of William Barr's widow, in which he acted as her agent, his liability was still more clear, as the pleadings in that process proved that he was aware of the existence of a will by John Barr; and that he might have corrected the error as to the prior payments, at least to a very great extent, in the distribution of the subsequent funds of division. To this it was answered for Mathie, that he acted merely as factor for the trustees, subject to their orders and directions, and not as their law agent or legal adviser, and was not therefore liable, even although he had given an erroneous opinion in law to the trustees, on which they had acted; that it was not usual to insist on a confirmation by nearest of kin, when their relationship was notorious and undisputed; that Mirrlees, the trustee, as factor loco tutoris to William Barr's son, must have been perfectly aware of the existence of John Barr's settlement in his favour, but that he nevertheless uplifted his share of the different funds, without claiming any part as in right of John Barr under the testament, and he himself distributed the last fund in the same way as the others, and that he, therefore, could not come on the defender for relief, as it was his own duty to have produced the settlement, and claimed John Barr's share for the boy, whose factor loco tutoris he was; and, at all events, that the defender's factory ended in 1808, when Mirrlees uplifted the only remaining fund of division, and thereafter managed it entirely himself, thus excluding any liability on the defender's part as to the last payment. The Lord Ordinary repelled the defences, and decerned against Mathie; but the Court recalled his Lordship's interlocutor, and found that he was not liable for such payments as were made by him prior to the process of aliment in 1806; but that he was liable for those made after the date of that process, with the exception of the last in 1814, as to which they assolized him.

**LORD GLENKEL.**—The most difficult point in the cause is to determine the relation in which the defender stood to the trustees. If the whole of the management was committed to him without the necessity of his consulting the trustees, so that he was in fact a commissioner rather than a common factor, it would be of no consequence whether he was a lawyer or not, as every one would be equally liable who put himself in such a situation. But this does not seem to have been the case; he seems to have taken the orders of the trustees as to the payments to be made; and I consider him, therefore, just an ordinary factor, who was not to make any payment without the authority of the trustees; and if he had paid at his own hand, without their authority, he would be liable whether a lawyer or not;—but this is not proved or alleged to be the case. The allegation is, that the payments were by his advice, and that he is liable for this erroneous advice; and in this view I doubt his liability, as the trustees were not bound to adopt his opinion. The heaviest thing against him is his having paid to parties who had made up no title as nearest of kin; and I rather incline to think that as to this, the maxim *spondet peritiam artis* applies; at the same time, the conduct of Mirrlees was such as might afford an excuse for him, for nothing could tend more to deceive Mathie than his concurring in the payments, when, as factor loco tutoris, he must have known of the will. As to the last payment there can be little doubt but that it was an operation of Mirrlees alone.

**LORD ROBERTSON.**—This is an action to recover compensation suffered by loss arising from alleged professional misconduct. It does not appear to me to be necessary to inquire minutely into the extent of Mathie's powers, as it is certainly made out that he had the charge of managing the funds. He was employed to pay over a certain sum; it was his duty to see that it was not paid to a person who had no right to receive it, and who could not give an effectual discharge; and I think, besides, that it is made out that he knew of the existence of the testament, and, at all events, he should not have paid without a confirmation; for although the trustees might have dispensed with confirmation, yet, if a factor does so, he does it *suo periculo*.

**LORD PITMILL.**—On the whole, though this is a hard case, I do not see any reason for altering the interlocutor. It is plain that the whole business of the trust was conducted by Mathie, and the discharges prove the payments to have been made by him on states drawn up by him. It was his business alone to consider who was entitled to John Barr's share after his death; and whatever were the limits of his factory, it was as much his duty not to pay to a person who was not entitled to receive as to get a proper receipt, and he should not have paid at all without confirmation, for, in consequence of the caution which must then have been found, no risk

would have been incurred. The whole error arose from Mathie's mistake in point of law ; and though there is no evidence that he knew of the testament at the time of the first payment, that does not affect the case, as the erroneous distribution might have been corrected in the subsequent payments, and, at any rate, it does not remove the objection to his paying without confirmation. I had considerable difficulty, however, as to the last payment in 1814, as I could not see exactly how the fact stood in regard to the defender having ceased to be factor in 1808.

**LORD ALLOWAY.**—I should doubt much if it be sufficient to subject a writer that he has paid money without requiring a confirmation, for the practice is universal to pay without this, and the caution found in confirmations would not be of much service in preventing loss. The circumstances of this case also are peculiar. The defender's responsibility here cannot arise from his receiving a commission as factor, but from his being a professional man ; for a mercantile agent would not be liable in such a case, though he received a commission of 5 per cent. ; and the question depends on whether he knew of John Barr's settlement. When he did know that there was a settlement, it was his duty, as a professional man, to have demanded to see it. But then Mirrlees, the trustee, was tutor to William Barr's son, and he must have been aware of the existence of the settlement ; and I doubt much whether Mathie can be made liable to relieve one who was much more blameable than himself, and whose duty it was to have produced the settlement, and made a claim on it for behoof of the minor. At all events, I think Mathie cannot be liable for the payments made before he knew of the settlement, or for the last one in 1814, before which his factory had clearly ceased, although the last discharges seem to have been copied from the others, and bear the money to have been paid by him, when it was most probably handed over by Mirrlees himself, in whose hands it was.

**LORD JUSTICE-CLERK.**—This question is attended with much difficulty, and raises the nicest question of professional responsibility which has ever come before the Court. It is clear that the defender stepped exactly into his brother's situation, and was allowed a commission of 2½ per cent., and also paid for any legal duty to be performed ; but I do not see any proof showing him to have been the law agent or legal adviser of the trustees. I consider him merely as factor, selected, however, on account of his legal knowledge ; and then the question is, whether he has incurred such responsibility as to be bound to relieve Mirrlees, who has been obliged to make a second payment. Now, I conceive that before subjecting Mathie there must be satisfactory evidence that he knew of the existence of the will, and the consequent risk he was running in making payment without confirmation ; and I therefore doubt much whether he can be held

liable for the payments made prior to the process of aliment, more especially as there was a misleading on the part of *Mirrless*, which forms an important specialty in the case. But after that process the case is much altered, as we can no longer hold him ignorant of the existence of the will, and then he ought to have required a confirmation. His not having done so, along with his knowledge of the will, (for I do not rest on the want of confirmation alone,) are sufficient to subject him in regard to the payments made after this, except as to the last, before which I think we must hold the factory to have ceased.

JAS. CRAWFORD, W. S.—J. GRANGER, W. S.—Agents,

No. 377. J. M'CULLOCH and Others, Pursuers.—*Forsyth—Jeffrey—Marshall.*

Sir A. M. M'KENZIE, Defender.—*D. of F. Cranston—Fullerton.*

*Entail—Title to Pursue.*—Held,—1.—That a party pursuing, as an heir of entail, an action of reduction of the sale of part of the entailed estate, sold under an act of Parliament, has no right to do so in consequence of his titles having been made up and possessed on in contravention of the original entail;—and,—2.—That several substitute heirs of entail, who joined with him in the same summons, were likewise barred from insisting in the action, because it concluded that this leading pursuer, who had so contravened, had the only just right to the lands sold, and was entitled to enter into possession thereof.

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Lord Cringetie.  
M'K.

IN the year 1762, John M'Culloch, then of Barholm, executed an entail of his lands of Barholm and others, in favour of himself in liferent, and in fee to John his eldest son, and the heirs-male of his body, whom failing, to the heirs-female of his body; then to his second son, and the heirs-male of his body, whom failing, to the heirs-female of his body; and so on to his third and younger sons, and their heirs-male and female in the same order; whom failing, to his several daughters seriatim, and the heirs-male and female of their bodies, in the same order of succession with those of the sons; whom failing, to various other substitutes set forth in the deed. By this entail it was, inter alia, provided 'that it shall not be lawful for the said John M'Culloch, my son, nor any of the heirs of tailzie or provision, to alter, innovate, or change this present tailzie and order of succession before prescribed;' and also, 'that the said John M'Culloch and whole heirs, &c. shall possess and enjoy the said tailzied lands and estate by virtue of this present tailzie, or nomination to be made by

‘ me, infeftments, rights, and conveyances to follow thereupon, ‘ and by no other right or title whatever,’ and these prohibitions were fenced by the usual irritant and resolute clauses, contraveners, however, forfeiting for themselves alone, and not for their descendants. Some time after infeftment had passed on this entail, a private act of Parliament was obtained by the entailer for the sale of part of the lands, for the purpose of liquidating such debts, contracted by him prior to completing the entail, as might be found to be effectual against the estate. Under authority of this statute, certain proceedings were instituted in this Court by the entailer, and afterwards carried on by the pursuers’ father, the institute, in the course of which several portions of the entailed estate were sold, and among others, one lot was purchased by the father of the defender, Sir Alexander Muir M’Kenzie, the present pursuers being then in minority. In 1791, the entailer being now dead, his son the institute executed a procuratory of resignation of that part of the estate remaining unsold, reserving his own liferent in favour of his eldest son the pursuer, (the heir alioqui successurus,) and the heirs-male, whom failing, the heirs-female of the pursuer’s body; whom failing, James Murray M’Culloch, his own second son, and the heirs-male and female of his body, thus calling the heirs-female of the pursuer’s body before the heirs-male of his own body were exhausted, contrary to the provisions of the original entail in 1762, in virtue of which the heirs-male of the body of the institute were called before any of the heirs-female of his body. This deed also took the heirs bound to purge any adjudications which might be led against the estate for any debts contracted by the institute prior to the completion of this new deed by infeftment, such debts not being chargeable against the estate under the original entail. In virtue of this procuratory, a new charter and infeftment were taken in favour of the pursuer, who was then a minor, but after his father’s death and his attaining majority, he continued to possess the estate under this title alone. In 1823, an action was raised at the instance of the pursuer, describing himself as ‘ heir of entail of ‘ the lands and subjects under written,’—‘ in virtue of a deed ‘ of tailzie executed by the said deceased John M’Culloch (his ‘ grandfather) on the 29th of December 1762 years, and recorded in the register of tailzies on the 13th of January 1763 ‘ years, and who stands duly infeft as heir of entail in the said ‘ estate of Barholm, conform to charter of resignation and novodamus in favour of the now deceased John M’Culloch, last of ‘ Barholm, the pursuer’s father, in liferent, and the said pursuer, his eldest lawful son in fee, dated the 13th day of De-

‘ cember 1791,’ &c. and also of ‘ Isobel M’Culloch, Anni M’Culloch, and Joanna M’Culloch, daughters of the pursuer the said John M’Culloch presently of Barholm, and the said John M’Culloch, as their administrator-in-law, Miss Ann or Agnes M’Culloch, sister to the said John M’Culloch presently of Barholm, and James Murray M’Culloch, his brother, all substitute heirs of entail of the said estate of Barholm,’ concluding for reduction of the several sales, and among others, of that made to the defender’s father, and the titles following thereon, and also to have it found and declared, ‘ that the pursuer, the said John M’Culloch, has the only good and undoubted right and title, not only to the whole of the said lands and others, but to possess the same, and to uplift the rents, mails, and duties, &c. thereof, in terms and under limitations and conditions of the said deed of entail, in all points,’ &c. The summons likewise contained a conclusion for removing, ‘ to the effect that the pursuer, the said John M’Culloch, and the succeeding heirs of entail by themselves, &c. may enter thereto,’ &c., and that the defender should account to the pursuer John M’Culloch for the bygone rents. This action was founded on the allegation that the sale sought to be reduced had been carried on collusively while the pursuers were in minority, without their having been properly called in the proceedings under the act of Parliament, and was consequently in contravention of the entail of 1762. It was met by several preliminary pleas; and after these had been disposed of, a new objection was taken to the title of the several pursuers, founded on the circumstance that the deviation from the provisions of the original entail of 1762 in the new deed of 1791, under which the pursuer John M’Culloch held the estate, and which was set forth in the summons as one of the grounds of his title to pursue, imported a contravention of that entail. The Lord Ordinary having reported the cause on informations, it was pleaded for the pursuers,—1. That the alleged act of contravention was not by the pursuer, but by his father, who made up the new titles, while the pursuer was a minor.—2. That though the possessing the unsold lands under the new titles might import a contravention in regard to them, it could not affect his separate right as heir of entail under the deed 1762, to the lands which had been previously sold.—3. That it was *jus tertii*, so far as the defender was concerned, to found on the alleged contravention of provisions intended solely for behoof of the subsequent heirs of entail.—4. That in challenging the sale in question, the pursuer did not challenge an act of contravention which cut down his own right, which was the peculiarity in the cases of Little Gilmour





and Gordon of Carleton; so that although he might have been barred, had his grandfather forfeited for his descendants by the contravention here complained of, viz. the sale sought to be reduced, yet as that was not the case, he was not precluded from pursuing this reduction, in which it was not necessary for him to approbate, to the effect of sustaining his title, the very act of contravention which he was also obliged to reprobate to the effect of setting that act aside.—5. That the concurrence in this action of the heirs, in whose favour alone the contravention operated, removed the objection, as was held in the case of Turnerhall.—6. That he was entitled to validate his title by purgation, there having been no declarator of irritancy;—and, 7. In regard to the substitute heirs, who were also pursuers, That the contravention by the heir in possession could in no way affect their title to pursue at least the reductive conclusions of the libel, which were alone those which they either did or could insist in,—the others being conclusions for behoof and at the instance of John M'Culloch alone. On the other hand, it was pleaded for the defender,—1. That the possessing under titles disconform to the original entail was in itself a contravention.—2. That the contravention, as to any part of the entailed lands, imported a total forfeiture under the entail 1762, of which the new title in 1791 amounted to a disclamation.—3. That where an heir of entail attempts to avail himself of the fetters of the entail to reduce the right of a third party, it is not *jus tertii* to that party to plead, that by his own acts of contravention the heir is not in a capacity to found on these fetters.—4. That although the pursuer here was not obliged to approbate and reprobate the same act of contravention, it was necessary for him to approbate and reprobate the same deed of entail,—to found on fetters, by contravening which he had forfeited his title to avail himself of them; and that this was the principle of decision in the cases of Little Gilmour and Gordon.—5. That the decision in the case of Turnerhall (where the contravener forfeited for his descendants) proceeded on the ground that the contravener was dead, after which the next substitute could not resolve the right of his descendants.—6. That although the pursuer might purge, and then bring a proper action, he had no title to insist in the present;—and, 7. That the other substitutes, by joining in a summons which concluded for reduction and possession for behoof of a contravener, had subjected themselves to the operation of the same objection. The Court unanimously sustained the objection as against the title of all the pursuers, and dismissed the action.

**LORD GLENLEE.**—It is a sufficient answer to a reduction of the nature of the present brought by an heir of entail, that he is not in a capacity to take benefit by it, and has repudiated the entail. The repudiation here is not implied but express, as that deed contains a clause prohibiting the heirs from possessing under any other title. As to the substitutes, their reduction is for behoof of the heir in possession, who is a contravener, and consequently their concluding for his behoof is itself a contravention. I can therefore see no reason for treating this case differently from that of Kilbucho, on which we lately gave our opinions on consultation by the other Division.\*

**LORD ROBERTSON.**—The new deed of 1791 contains an alteration fatal to the title of the pursuers, which it is not *jus tertii* to the defender to plead.

**LORD PITMILLY.**—I am of the same opinion.

**LORD ALLOWAY.**—It is clear that John has contravened, and in the course of five years prescription will have run in favour of the new order of heirs, and against those of the deed 1762. This is therefore a stronger case than that of Little Gilmour, where the contravention was by an ancestor, not by the party himself, and where the ancestor's right must have been irritated before that of the pursuer could have been affected. As to the substitute heirs pursuing here, they conclude only through John, and for his behoof; and I consider this a stronger case than that of Kilbucho, in which we have given our opinions against the pursuer's title.

**LORD JUSTICE-CLERK.**—I entirely agree that this is a much stronger case than that of Kilbucho, and I can see no ground for not sustaining the objection as against all the pursuers.†

*Pursuers' Authorities.*—8. Ersk. 8. 82; Lord Ballenden, Jan. 12. 1698, (7811); Lord Ballenden, Feb. 8. 1702, (7816); Duke of Roxburgh, July 21. 1732, in H. of L., (Craigie and Shaw Stewart's Appeals, No. 27); Campbell, Feb. 5. 1760, (7783); Affirmed in H. of L.; Creditors of Cromarty, Feb. 25. 1762, (15417); Turner, Nov. 17. 1807, (F. C.); Hamilton, July 23. 1748, (7281); Ross, Nov. 18. 1766, (7789); Sandford, p. 298.

*Defenders' Authorities.*—Gordon, Nov. 14. 1749, (15384); Little Gilmour, March 6. 1801, (Ap. No. 9, Tulzie.)

JOHN FORMAN, W. S.—MACKENZIE and SHARPE, W. S.—Agents.

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\* This case is not yet decided.

† Three other cases at the instance of the same parties were similarly decided.

HON. MRS. WESTENRA and HUSBAND, Pursuers.—*Forsyth.*

No. 378.

M. R. H. M'NEILL, Defender.—*Rutherford.*

*Teinds.*—Entries in an old rental-book of payments of a specified amount of teind-duty held sufficient evidence of a modus, according to which the titular was entitled to enforce payment of arrears.

THIS was an action at the instance of Mrs. Westenra, as executrix of the late Douglas Duke of Hamilton, for payment of arrears, from his Grace's accession in 1772 to his death in 1799, of certain teind-duties alleged to be payable out of the lands of Raploch, belonging to M'Neill, and of which the Dukes of Hamilton were titulars. M'Neill pleaded in defence,—1. That the teinds had never been valued, and that there was no sufficient evidence of the amount of teind-duty, and that therefore, agreeably to the principles of the decision in the cases of *Lady Christian Graham v. Pate*, and *Scott v. Ancrum*, he could not be subjected in payment;—and, 2. That at all events teinds were debita fructuum, and therefore that he, being an heir of entail, was not liable for any arrears prior to his own accession in 1788. The Lord Ordinary sustained this last defence, and reported the cause on minutes as to the other; and excerpts having been produced from the rental-book of the Hamilton family, showing entries of a certain specified amount of teind-duty in kind as paid for the four years 1758–1761, the Court found that there was sufficient evidence of a modus, and remitted to the Lord Ordinary to ascertain the precise amount in money of the arrears due.

May 18. 1826.

2D DIVISION.  
Lord Cringletie.  
F.

**LORD JUSTICE-CLERK.**—I have now no doubt in this case. I formerly thought that the amount of teind had been altogether in dubio; but the certified excerpts from the rental-book specify distinctly what the amount of the teind was, and we can give decree, therefore, without touching the cases of *Graham* and *Ancrum*.

**LORD GLENLEE.**—There is sufficient evidence of a fixed modus of what had been in use to be paid; the prices, of course, must be determined according to the fiars of the several years.

The other Judges concurred.

*Pursuers' Authorities.*—2. *Ersk.* 10. 82; *Mutter*, June 25. 1775, (*App. Teinds*, 2.)

*Defender's Authorities.*—*Scott*, Feb. 25. 1795, (15700); *Graham*, Feb. 20. 1799, (11063.)

**FORSYTH and MACDOUGALL, — D. STEWART, — Agents.**

No. 379. EXECUTRIX of J. VANS AGNEW; Pursuer.—*Moncreiff—Pyper.*

EARL of STAIR and Others, Defendants.—*D. of F. Cranstoun—A. Bell.*

*Bona Fides.*—Portions of an entailed estate having been judicially sold in a process of sale under an act of Parliament, to which certain minor heirs of entail were required to be parties, and the sales not being challenged for many years, but ultimately reduced by the House of Lords reversing an unanimous judgment of the Court of Session, on the ground that the minors had not been properly brought into Court—Held, in a question relative to a claim on the part of the heir of entail for bygone rents, that the purchasers were in bona fide till the judgment of the House of Lords, and were not liable for the rents till the first term after the date of that judgment.

May 19. 1826.

2d Division.

Lord Macken-

sie.

B.

IN 1757, Mr. Agnew of Sheuchan, and Mr. Vans of Barnbarroch, (who had married the only daughter of the former, and assumed the name of Agnew,) executed mutual entails of their estates in favour of the heirs of the marriage and certain other substitutes, under the usual limitations. The entail was immediately recorded, but no infeftment passed on it till 1775, being 18 years posterior to its date. On Mr. Vans' death in 1780, his eldest son, Robert Vans Agnew, made up titles under the entail; and the Court having found, in an action at the instance of Messrs. Stewart and Drew, as trustees for Mr. Vans' creditors, 'that the estate of Barnbarroch is still affectable by the 'debts due by John Vans of Barnbarroch at the time of his death,' he brought an action for reducing and setting aside the entail. Having failed in this, he applied in 1785 for, and obtained a private act of Parliament, which, after reciting, *inter alia*, that the next heirs of entail were 'all infants,' provided, that 'it shall 'and may be lawful to and for the Judges of the Court of Session in Scotland, upon an action to be instituted in the said 'Court in the name of the said Robert Agnew, now of Sheuchan, 'Esq. or in the name of any other heir of entail of the said entailed 'estates for the time, against the other heirs of entail then in 'being, to inquire into and ascertain the extent and amount of the 'debts owing by the said John Vans Agnew at the time of his 'death, and chargeable upon or effectual against the said entailed estates, or any of them, and after having fixed and ascertained the extent of such debts, by interlocutors or judgments 'in that behalf, to allot, order, and direct' such disconnected parts of the estates of Sheuchan and Barnbarroch as should be necessary to discharge the whole of the debts so to be ascertained, 'to be sold for payment of the said debts,'—'and in general to 'pronounce such interlocutor or interlocutors, and to have and

‘hold such proceedings as the Judges are in use to pronounce and to hold in or concerning processes or actions of sale of the estates of bankrupts.’ And by another clause it was enacted, ‘That the purchaser or purchasers of the lands and estates, under the authority of this act, his, her, and their heirs and assignees shall, by the decree or decrees of sale thereof, have good and effectual right and title to the lands and estates so to be purchased, free and clear, and freely and clearly exonerated, acquitted, and discharged, of and from the prohibitions, limitations, and irritancies of the said entail, and of and from all the debts and deeds of the entailers, their heirs and successors, and every of them, and of and from every other debt, incumbrance, defect of title, or ground of eviction whatever, in as full, ample, and beneficial a manner, to all intents, constructions, and purposes whatever, as any other purchaser or purchasers of lands and real estates, at judicial sales before the Court of Session, may, can, or ought to have by the law and practice of Scotland.’ Under authority of this act Robert Vans Agnew raised an action of declarator and sale against the whole heirs of entail then in existence. His own children (including John Vans Agnew, his second son) were all minors; and the action was executed against them by service on them personally, and calling their tutors edictally; and among certain pleadings given in to the Court on a disputed point, in the course of the proceedings there appeared a paper for these minor children, and for the late Lord Braxfield as their tutor ad litem; but no interlocutor appointing his Lordship to that office could be discovered in the process at the date of the appeal to be afterwards mentioned, nor was it stated in the decree afterwards pronounced, that he was their tutor ad litem. After a good deal of procedure as to the proof of the amount of debts chargeable on the estate, and the value of the land to be sold, four lots were exposed by public roup in 1788. Considerable competition arose at the sale, and the several lots were purchased by the predecessors of the present defenders, who were chiefly neighbouring proprietors, much above the upset price, which was fixed by the Court at 25 years purchase of the proven rental. The first lot, exposed at £1798, sold for £4050; the second, at £2444, was purchased for £2700; the third, at £4056, brought £7000; and the fourth, exposed at £3252, was bought at £4500. A fifth lot was brought to sale in 1793, and was purchased at a little above the upset price (£3459) by Mr. Balfour, writer to the signet, for behoof of Robert Vans Agnew himself, the pursuer of the sale, and afterwards, in 1805-6, sold in numerous lots to several of

the defenders or their predecessors for about £14,000 in all, and the conveyances to these lots narrated the circumstance of the lands having been purchased by Mr. Balfour for behoof of Robert Vans Agnew. The several purchasers entered into possession of their different lots; (some of which were again sold by them to other parties,) and they immediately commenced expending large sums in the improvement of the lands purchased by them, and continued to incur much expense in ameliorations during the whole period of their after possession. Robert Vans Agnew died in 1809, and was succeeded by his son, John Vans Agnew, who immediately entered appeals, (which he was still entitled to do, in consequence of minority and absence in the East Indies,) first, against the interlocutors in the process of sale; on the ground that the proceedings had been carried on without the minor heirs of entail (of whom he was one) having been properly called into Court, and without a tutor ad litem having been appointed to them; and, second, against the judgment in the action at the instance of Stewart and Drew in 1784, finding the estate of Barnbarroch liable for the debts of the entailer John Vans. The appeal against the decree of sale was objected to as incompetent, such decree being in a totally different situation from a judgment in an ordinary suit, and it was accordingly, in 1814, dismissed by the House of Lords as incompetent, 'reserving to the appellant such relief, if any, as he may be entitled to in any other mode of proceeding.' At the same time, in the other appeal with Messrs. Stewart and Drew, the House remitted to this Court to review the cause generally, and the Court subsequently adhered unanimously to the judgment of their predecessors. Immediately after the first appeal was dismissed, John Vans Agnew raised the present action of reduction of the process of sale, decreets therein, and titles following thereon, against the several purchasers or their representatives; and further concluding for the bygone rents from the period of his accession to the entailed estate. This action was chiefly founded on the plea, that the pursuer and the other minor heirs had not been properly called into Court, and that no tutor ad litem had been appointed to attend to their interest in the proceedings under the act of Parliament, the only evidence of such appointment which now appeared on the process being the mention of Lord Braxfield, (at that time on the Bench,) as tutor along with the children, on the title of a paper given in to the Court on a disputed point. It was pleaded in defence, that the minors had been called in the only manner competent; and as to the appointment of the tutor ad litem, that after a lapse of 30 years, parties were not bound to produce the warrants

of their decrees; and that from the negligent manner in which processes were then kept, especially after extract, and the dilapidated state of the papers in the process of sale, the interlocutor appointing a tutor ad litem might easily have disappeared or been obliterated, while the fact of the appointment was sufficiently proved by the paper given in to Court in name of the tutor, at a time when the person so mentioned as tutor sat on the Bench as one of the Judges. This Court having repelled the reasons of reduction, Mr. Vans Agnew appealed, and the House of Lords pronounced the following judgment:—(July 31. 1822.)—‘ It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the said several interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is declared, that the appellant and the other children of Robert Vans Agnew, who were named as defenders in the action of declarator and sale, raised at the instance of the said Robert Vans Agnew, appearing on the face of the proceedings to have been minors at the several times of pronouncing the interlocutors in the said cause, and not to have been properly brought before the Court as defenders in such action, according to the provisions of the act of Parliament in the said action mentioned, the Court had no authority to pronounce any interlocutor in such action affecting their interests, and especially to proceed to a sale of any of the lands of Barnbarroch or Sheuchan in the said act mentioned; and therefore that all the proceedings of the said Court in the said action of declarator and sale, so far as the same affected the interests of such minors in the said estates respectively, under the deed of entail of the said act, and in the said proceedings mentioned, were proceedings without the authority for that purpose required by the provisions in the said act of Parliament, and were therefore null and void as against the appellant, and the several other minor heirs of entail, and that the appellant, on behalf of himself, and the said several other minor heirs of entail, is entitled to have the sales made under the several interlocutors aforesaid reduced, and to have the lands restored to him, along with the rents from the period of his accession to the entailed estates, subject to such proceedings as may be had in an action to be instituted in the said Court, under the authority of the said act, for the purpose of inquiring into and ascertaining the extent and amount of the debts owing by the said John Vans Agnew at the time of his death, and chargeable upon or effectual against the said entailed estates, or any of them, to the end that the said Court, after having fixed and ascertained the extent of such debts by

‘interlocutors or judgments in that behalf, may proceed to the sale of such parts of the said estates respectively as may be necessary, in such order, manner, and form, as directed by the said act, and it is therefore ordered and adjudged accordingly: And it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to execute this judgment, and further to proceed as shall be consistent with this judgment, and shall be just.’ Thereafter, in March 1828, on a petition to be reheard, the House of Lords so far altered the finding regarding the restoration of the bygone rents, as to order ‘that the said judgment be amended by omitting the words, ‘along with the rents from the period of his accession to the entailed estates,’ and inserting instead thereof the words, ‘without prejudice to any question which may be made in the further proceedings in the Court of Session, touching the rents of the entailed estates, and the application thereof during any period of time.’ The Court having applied the judgment thus amended, and remitted to the Lord Ordinary to hear parties as to this question of bygone rents, his Lordship reported the cause on informations. On the part of the defenders it was pleaded, That the rents were *bonâ fide percepti et consumpti*, and therefore that, according to the fixed principles of the law of Scotland, they could not be claimed by a party succeeding in a reduction of their title to possess the lands; and they contended that their *bona fides* arose from and was proved by the circumstances of the case, viz.—the sales having been made in virtue of decrees of this Court, always considered the most secure of all titles to land, and conducted in presence of one of the Judges of the Court—the great competition which occurred for the different lots—the high prices paid by the purchasers, amounting in some instances to nearly three times the upset price—the unanimous judgments of the Court in the action with Stewart and Drew, finding the estate of Barnbarroch affectable by the entailor’s debts—the long period allowed to elapse, during which their rights remained unchallenged, and during which they expended very large sums in ameliorating the properties—and the judgment of this Court unanimously assailing them from the action of reduction, all tending to prevent any *conscientia rei alienæ*, and to maintain their *bona fides*, down to the date of the judgment of the House of Lords in July 1822. On the other hand, the pursuer founded on various circumstances tending to prove, as he alleged, that the whole proceedings of Robert Vans Agnew were a fraud against the heirs of entail, and that the defenders were cognizant of this fraud; that the defect of not having properly brought into Court the minor children of Robert



Vans Agnew was obvious on the face of the proceedings, and was therefore a nullity of which the defenders must have been aware, or which at least they must be presumed in law to have known, so as to bar the plea of bona fides against the true proprietor of lands, which is necessarily considered unfavourable in the eye of law; and, at all events, that the appeal in 1810 against the decreets of sale must have put an end to the bona fides, had such existed. Mr. Vans Agnew having in the mean time died, Mrs. Anne Robertson was sisted as his executrix; and the Court thereafter unanimously repelled the claim for bygone rents for crop and year 1822, and all preceding years.

**LORD JUSTICE-CLERK.**—In proceeding to decide this claim for bygone rents, (in doing which we must follow out the judgment of the House of Lords to its fullest extent,) it appears to me to be absolutely necessary to advert, in the first place, to one leading point in the pursuer's pleading; for, if it have any solid foundation, it must materially affect the question at issue; and this is the allegation, that the whole proceedings were bottomed on gross fraud and deception, in which all the parties here, or those whom they represent, were acting and cognizant. Now I am thoroughly satisfied, that instead of this being made out in point of fact, the pursuer has utterly failed in his attempt to cast suspicion on these parties. There are not, even in point of averment, such facts condescended on as would lead to a belief of fraud on the part of Robert Vans Agnew, and still less of any participation on the part of the purchasers, even if fraud on his part had actually existed. Throwing this allegation, therefore, out of view, we must consider the proceedings which took place here. Robert Vans Agnew obtained an act of Parliament, and under its authority pursued an action of sale, in which he cited the minor heirs; and the Court having to decide one question on memorials before themselves, a paper was given in for these minor heirs, and Lord Braxfield as their tutor ad litem, on which the Court fixed the amount of the debts. The lands were then exposed in various lots, under authority of the Court. A great competition arose, some of the lots bringing greatly above the upset price. The lands were then adjudged to the purchasers, who entered into possession, and immediately commenced laying out large sums in improvements; and their titles were never challenged till 1810, 22 years after the purchase. I may here observe also, that I can see no difference between the lot bought in by Mr. Balfour in 1793, and resold in 1806, and the others. It was an every-day practice to purchase lands in this situation for the family, and I do not see any thing fraudulent in Mr. Balfour's conduct; nor could the purchasers suspect any such fraud on his part; and when the lands bought by him were resold in 1806, the

value of landed property had greatly risen, and the purchasers gave a fair, adequate, and even high price for their lots. The appeal taken in 1810 was dismissed as incompetent. Then a new action was brought, and the Court, after full investigation, decided unanimously, as their predecessors had done. If bona fides existed, every thing went to confirm it till the judgment of the House of Lords, which proceeded on this, that there was no actual appointment of Lord Braxfield as tutor ad litem appearing on the record. If ever there was a case where the proceedings contradict the allegation of fraud, and where purchasers were justified in relying on their titles, it is this. Independent of the character of the agents employed, laying honesty out of sight, would they, as men of ability, have advised their clients to purchase on a title appearing to be obviously null? Were not these gentlemen entitled, on seeing the minors as parties, and one of the Judges of the Court appearing on the face of the pleadings along with them as their tutor ad litem, to conclude that he had been regularly appointed? If they had entertained a doubt as to this, would they have advised the purchase, or would the purchasers have at once commenced to lay out so much on the lands, if they had had the slightest suspicion of the validity of their titles? Nor is it wonderful that they should have relied on that which every student of law is from the earliest period taught to consider as the best title to land which a man can get—a title revised by and under the authority of the whole Court. This is a much stronger case than the recent ones of Queensberry and Roxburghe, and we cannot come to any different result in it. I cannot think that the bona fides ceased till the judgment of the House of Lords; and although, from the term of Martinmas following, the rents belonged to Mr. Vans Agnew, yet there is no ground for any farther demand.

**LORD GLENLEE:**—I cannot conceive that there should be a doubt on this question. I agree with my Lord Justice-Clerk that the pursuer has totally failed in establishing his allegation of fraud against his father, and still more so as against the defenders, many of whom are purchasers from purchasers. The pursuer seems to suppose that the general and positive rule is, that bygone rents necessarily go as accessory to the property. This may hold as to fruits still on the lands; but as to fruits long ago separated, I cannot hold them as still accessory to the soil. The right to them depends more on the right of possession;—they are acquired by occupancy. It is no doubt true, however, that if the way and manner of occupancy be fraudulent, the party must restore; but the mala fides must be made out against him. The rule is, not that the possessor is bound to restore, and that the right to retain is an exception; but the proper rule is, that he is entitled to retain the fruits, and the burden of proving fraudulent or mala fide occupancy lies on a claim-

ant. This, again, will depend simply on whether the nullity was of a kind that any man looking at it must have been aware of it, and not on whether the nullity was absolute, or the title only reducible from extrinsic circumstances. It is the rule of our law, that whether the nullity be intrinsic or extrinsic, if the possessor be not aware of it, and on good grounds supposes his title good, he will be in bona fide, whether it be set aside as originally void, or as so from extrinsic circumstances. The defenders here could not possibly be aware that their title was null; and the only point is, When did they become conscious of a bad title? The earliest possible period was the date of the ultimate judgment of the House of Lords after the application for a rehearing, as the matter was kept open till then; but the parties have restricted themselves to the date of the judgment in July 1822.

**LORD PITMILL.**—Your Lordships have given your opinions so fully, that nothing remains for me but to express my entire concurrence with your Lordships, in relation both to the questions of fact and those of law. This is not one of the difficult cases of bona fides, as, in many cases where the defences had been repelled in this Court, the bona fides has been held not to cease till that judgment was affirmed.

**LORD ALLOWAY.**—I entirely concur with what has been already stated; but in a case of this nature it will perhaps be proper for me to deliver my opinion more fully than might otherwise have been necessary. The question of law is very short and simple in the point left open, and I do not mean in the least to call in question any principle laid down by the judgment of the House of Lords, but shall confine my observations solely to the point of bona fides. The judgment of the House of Lords must have proceeded on the want of evidence of the appointment of a tutor ad litem, after the cause came into Court; for the citation against the minors personally, and tutors and curators edictally, was quite regular, it being impossible to appoint a tutor ad litem till a cause is brought into Court. But, prior to the sales being effected, perhaps not less than 100 persons, as agents for intending purchasers, must have examined this process; and it cannot be believed but that they found the proceedings correct, or they never would have advised a purchase. No objection, indeed, was ever stated to their accuracy; and the keen competition which ensued, and the large sums immediately expended by the purchasers, is real evidence of their bona fides, of which I do not see a single circumstance calculated to create even a doubt. It is said by the pursuer that they took extrajudicial warrandice from Lord Galloway and Admiral Stewart. This is most satisfactorily explained; these persons were creditors, and each creditor must grant warrandice to the extent of his debt, to which extent only they did so—a proceeding not only proper, but necessary. It is said,

however, that the purchasers must have seen at one glance that the title was inept, from the want of an appointment of Lord Braxfield as tutor ad litem appearing on the record. Now, supposing this defect could then have been observed by them, in order to ascertain the effect which it would produce on the minds of agents at that day, as creating a doubt of the title, it is necessary to attend to what was then the state of our records. From having been an apprentice to a writer to the signet, I had occasion to know personally that, previous to the building of the Register-house, processes were kept in the most negligent manner, and in the most horrible places; and after decree was extracted, they remained in the hands of the extractors, who might have kept them in their own houses, or where they pleased; in consequence of which, had it not been for the rule of law, that parties are not obliged to produce the warrants of their decrees after 20 years, no decree could have been secure. Supposing, therefore, that the whole body of practitioners had searched the records, and seen pleadings in the name of Lord Braxfield, along with the minors, as their tutor ad litem, but had been unable to find an original appointment, which is generally about two lines on the back of some paper in process, not one of them could have entertained a doubt on that account. I conceive it impossible, therefore, to hesitate in sustaining the plea of bona fides here. All our lawyers mention cases where the parties have been held in bona fide, and in which the circumstances cannot be compared to this; and the only question is, When did this bona fides come to an end? I rather think that it remained till the final judgment of the House of Lords; but the defenders have limited their plea to the judgment in July 1822, and we cannot carry it further. It must, however, go down to the Martinmas after the judgment; as during the term a man is subsisting on the faith of the rents, though not reaped till the term-day; and this has been the principle always adopted by this Court, and also by the House of Lords in the Queensberry and other cases. On the whole, I never had so little doubt in any case which ever came before this Court, as in the present.

*Puruer's Authorities.*—Grant, Nov. 16. 1668, (1743); Lady Cardross, Jan. 3. 1711, (1747); Agnew, July 15. 1746, (1732); York Buildings Co. v. M'Kenzie, May 13. 1795, (F. C.)

*Defenders' Authorities.*—Dig. 50. 16. 109; 1. Stair, 7. 12. and 2. 1. 22-4-5; Bonny, July 30. 1760, (1728); Leslie Grant, Feb. 9. 1765, (1760); Lawrie, June 21. 1769, (1764); Wilson Bowman, June 11. 1805, (F. C.); Jackson, July 5. 1811, (F. C.); Duke of Roxburghe, Feb. 17. 1815, (F. C.); Turner, March 2. 1820, (F. C.); Elliott, May 30. 1822, (ante, Vol. I. No. 499); Duke of Roxburghe, June 13. 1822, (ante, Vol. I. No. 537); Duke of Buccleuch, Nov. 13. 1822, (ante, Vol. II. No. 5); Earl of Wemyss, Jan. 14. 1823, (ante, Vol. II. No. 106).

J. B. GRACIE, W. S.—JOHN BELL, W. S.—Agents.

EXECUTRIX of J. VANS AGNEW, Petitioner.—*Moncreiff—Pyper*. No. 380.  
 TRUSTEES of EARL of STAIR and Others, Respondents.—  
*D. of F. Cranstoun—A. Bell.*

IN the sequestration mentioned ante, Vol. II. No. 440, Vol. III. Nos. 171, 229, 349, the Court granted warrant for payment to the respondents of the arrears of rent due at Martinmas 1822, recovered by the judicial factor, and for payment to the petitioners of those falling due subsequent to that term.

May 19. 1826.

2d DIVISION.

M.K.

J. B. GRACIE, W. S.—JOHN BELL, W. S.—Agents.

J. and P. DUGUID and Others.—*More*.  
 W. DUGUID and Others.—*Skene*.

No. 381.

*Proof—Process*.—A commission to take a proof in America having been granted in terms too general, the Court made it more specific.

THE Lord Ordinary having granted a commission for taking a proof as to certain persons being the lawful children of a man who had left this country for America in 1768, 'to any Judge of a Court of Common Pleas, or any Justice of the Peace in the United States of North America or Province of Canada, due notice of at least three weeks being always made before proceeding to prove,' &c.—one of the parties reclaimed on the ground that the commission was too broad, both as to the persons to whom commission was granted, and in regard to there being no distinction as to the places where the examinations were to be conducted. The Court recalled his Lordship's interlocutor, and granted commission 'to any Judge of the Supreme Court of the United States of North America or Province of Canada, or to any Justice of Peace, being a Judge of a Court of Common Pleas in the said United States of North America or Province of Canada, or to the Mayors of the towns or cities of these States or Province, to take said proof at any place said Judge or Mayor shall appoint—a month's notice being given thereof, in sufficient time, to the known agent in America for the trustees and residuary legatees of the late William Duguid, and allow the said trustees and legatees a conjunct probation thereanent.'

May 20. 1826.

2d DIVISION.

Lord Cringletie.

B.

MORISON and BURNETT, W. S.—A. GREIG, W. S.—Agents.

No. 382.

E. FAIRWEATHER, Pursuer.—*A. McNeill*  
J. LYALL, Defender.—*Jeffrey—Neaves.*

*Parent and Child—Bastard.*—Circumstances in which it was found that the father of a bastard son, of six years of age, was entitled to get the custody of it from the mother, and place it with the schoolmaster of the parish.

May 23, 1826.

1st Division.  
Lord Eldin.  
S.

FAIRWEATHER brought an action against Lyall, concluding for £17 yearly of aliment of a male child, born on the 24th of September 1819. Lyall admitted that he was the father of the child, and had an income of at least £1500 a year; but stated that the mother had been recently married, and that he was desirous to place the child with the schoolmaster of the parish, and was willing to pay a board of £12 per annum. To this it was answered, That the child was in bad health; that the mother had the right to the custody of it, and that it would be better attended to by her than by a stranger. The Lord Ordinary found her entitled to aliment at the rate of £6 per annum from the 1st of February 1823 to September 1825; but found that ‘at this period the boy must be delivered to the defender, who is to aliment him at the rate of £12 per annum.’ On advising a representation, he adhered to the above interlocutor, ‘in respect of the defender’s offer to take the child, and place him with the schoolmaster of the parish, at a board of not less than £12 per annum; and found that the pursuer, being now a married woman with a separate family, has no claim to the custody of said child, or to aliment on account of it, after the term of Candlemas 1826.’ Fairweather having reclaimed, the Court, before answer, remitted ‘to Dr. Gibson, physician in Montrose, or, failing him, to such medical practitioner as he shall name, to examine the state of the health of the child within mentioned;’ and he having reported that from the period of its birth there had been a small sinus on the top of the breast-bone, but which did not affect the general health of the child, and was now, by an operation which he had performed, in a healing state, and would be quite well in a fortnight, the Court adhered to the last interlocutor of the Lord Ordinary.

**LORD PRESIDENT.**—With regard to the rate of aliment, we should be governed more by the rank of the mother than by that of the father; because, if we were to give it in proportion to the amount of his income, we should just be holding out a premium to persons in her situation of life to submit to the embraces of the rich. The mother here is married, and has now got a family of her own; and if the child is to remain with her, the aliment will go to the off-

spring of her husband, and this child will be neglected. I therefore think it will be more expedient that the child should be placed with the schoolmaster,

LORD HERMAND.—I am of the same opinion.

LORD GILLIES.—I think that the aliment which has been awarded is quite inadequate; and I see nothing in the conduct of the defender, but rather the reverse, to induce us to place the child in his custody, or under his control,

LORD CRAIGIE.—The question in all these cases is, What is for the chief benefit of the child? The father has not had the same means of acquiring an affection for the child which the mother has had. Besides, it has a natural defect, which will be better attended to by her than by him. As to the amount of the aliment, we have always been regulated by the income of the father.

LORD BALGRAY.—The main consideration is the benefit of the child; and it appears to me that, under the circumstances of this case, it would be more beneficial for it to be with the schoolmaster than with the mother.

*Purser's Authorities.*—Tait's J. P. 65; Glendonwyn, Nov. 19. 1782, (445); Paterson, Nov. 29. 1782, (445); 1 Dig. 5. 26; 2 Hutch. 267; Short, Feb. 21. 1795; (442); Burren, March 4. 1758, (1337); Godby, July 7. 1815, (F. C.); Hunter's Trustees, Dec. 2. 1830, (F. C.)

*Defender's Authority.*—Baxter, July 5. 1825, (ante, Vol. IV. No. 119.)

C. F. DAVIDSON, W. S.—T. DEUCHEAR,—Agents.

P. GRAHAM, Pursuer.—*Cuninghame.*

Hon. Mrs. WESTENRA, Defender.—*Forsyth.*

No. 383.

*Superior and Vassal.*—Held that a vassal is entitled to object to the liferent of the superiority of his lands being split, and conveyed to two different parties.

IN 1754 James Duke of Hamilton granted a charter to William Graham of the estate of Fairneinies, including Capellie and other lands, and on which infeftment was taken. In 1786 Patrick Graham, the son of William, was entered vassal by a precept of clare constat from Douglas Duke of Hamilton, on which he was infeft. Thereafter, in 1790, the Duke granted a conveyance of the fee of the superiority of Capellie to Patrick Graham; but the right remained personal, no infeftment having been taken. Subsequently Douglas Duke of Hamilton conveyed the superiority of the whole estate of Fairneinies, with a great variety of other subjects, in favour of Mrs. Westenra, who made up titles to them, and was infeft. In 1815 she conveyed the liferent of the superiority of Capellie to Mr. Maconochie, and of the remaining part of the lands of Fairneinies to Mr. Ferguson.

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Lord Medwyn.  
S.

This having been objected to by the vassal, as creating a multiplicity of superiors, Mr. Ferguson renounced his right in favour of Mrs. Westenra, who thereupon disposed it to Mr. Maconochie. In the mean while, the former vassal being dead, the present pursuer, his grandson, was served to him both as heir of line and of provision, and he raised an action of damages against Mrs. Westenra for having conveyed the liferent of the superiority of Capellie to Mr. Maconochie, to which he claimed right in virtue of the transaction with Douglas Duke of Hamilton. After this action had been remitted to the Jury Court, Mr. Maconochie disposed to Mr. Napier the liferent of the superiority of that part of the lands which had been formerly vested in Mr. Ferguson, so that there were now two liferent superiors over the lands held by the pursuer. He then brought a reduction on the ground of this unlawful multiplication of superiors, and concluding for reduction of the liferent rights of superiority in favour of Mr. Maconochie and Mr. Napier. In reference to the defences, the Lord Ordinary found, ' that the plea of multiplication of superiors would ' have been available to the pursuer, if he had had no other character than that of vassal in the lands; but as he asserts his ' right to the superiority of Capellie, and has completed his title ' to it, he, or his predecessor at least, whom he represents, has ' consented to a multiplication of superiors over the lands contained in the feu-right, and he cannot object to the defender ' Mrs. Westenra either retaining the superiority of the rest of the ' lands herself, or conveying them, as she has done, in liferent to ' Mr. Napier; so that, while the pursuer is the superior of the ' lands of Capellie, Mr. Napier as liferenter, and Mrs. Westenra ' as fiar, are superiors of the rest of the lands, over which there ' is thus no multiplication of superiors: That the pursuer's ' right of superiority of Capellie must be burdened with the liferent of Mr. Maconochie, who, having acquired his title bona fide on the faith of the records, cannot be called upon to renounce a right which is prior in date to the title of the pursuer; ' and further, that his right cannot be set aside on the grounds ' maintained in this action, as it is a mere rider on the fee of the ' superiority vested in the pursuer, which has not split the superiority, and multiplied superiors: That the claim of the pursuer, ' in these circumstances, seems to resolve into a claim of damages, ' which accordingly has been brought, and is now before the Jury ' Court; and therefore, on the whole,' repelled the reasons of reduction, and assolized the defenders. But the Court, being satisfied that there was a multiplication of superiors, and that the



action of damages did not affect the question, altered, and determined in terms of the libel.

JOHN TWEEDIE, W. S.—R. CAMPBELL, W. S.—Agents.

Lieutenant J. CAMERON, Complainer.

No. 384.

*Letters of Supplement.*—Letters granted by this Court in supplement of letters of second diligence by a Sheriff of one county to force comparance of a witness resident in another county.

ALEXANDER CAMERON, residing in the county of Ross, having been cited as a witness before the Sheriff of Inverness on letters of supplement, and having failed to appear, the Sheriff granted letters of second diligence, whereupon the defender in the action (for whose behoof the witness was cited) applied to this Court for letters of supplement. Lord Medwyn having reported the application as one which had never previously occurred, the Court unanimously instructed him to grant warrant for the letters of supplement.

May 25. 1826.

2d DIVISION.  
Bill-Chamber.  
Lord Medwyn.

J. GRANT, W. S.—Agent.

W. YOUNG, Advocate.—*Moncreiff—Jardine.*

No. 385.

H. O'ROURK, Respondent.—*More.*

*Conditional or Suspensive Sale—Jurisdiction.*—An assignation of a lease in security having been granted, with a declaration that it should become absolute on failure to repay the money advanced, and on payment by the assignee of the balance of an agreed on price—Held, that no declarator of forfeiture of the right of redemption was necessary to make the conveyance absolute; and Observed, that the Magistrates of burghs have no jurisdiction in such declarators, or as to a conclusion to cancel documents.

ROWLEY held a lease of certain premises near Glasgow; and having, in March 1807, received from the respondent O'Rourk an advance of £150, he became bound to repay this sum on the 7th of September thereafter, and assigned to O'Rourk the lease in security, with the usual clause of reversion in the event of his repaying the money on the day stipulated. But it was further agreed, 'That if he should fail to make payment of the whole and every part of the foresaid sums, principal, interest, and expenses, on the said 7th day of September next, then, and in that event, the clause of reversion before written shall cease for ever, and become void and null, and it shall no

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Lord Cringetie.  
M'K.

‘longer be in the power of me or my foresaids, at any after period, to redeem the said tack and subjects; but in that event, and on the said Hugh O’Rourk making payment to me or my foresaids of the further sum of £50 sterling, under deduction of the interest that shall then be due on the foresaid principal sum of £150, and the expenses foresaid, or (in case of our absence, or refusal to accept of the said sum,) on consignment thereof in the hands of any responsible banking company in Glasgow, to be made furthooming to me or my foresaids, and that within six days of the said 7th day of September next, on such payment or consignment, the assignation before written shall become irredeemable, and the said tack shall become, and is hereby in that event declared to be, the absolute property of the said Hugh O’Rourk and his foresaids; and I and my foresaids shall be obliged to grant, at our expense, such further deeds to him or his foresaids as shall be necessary for vesting the said tack irredeemably in their persons; it being explicitly understood and declared, that the irredeemable right to the said tack and subjects accruing in said events to the said Hugh O’Rourk and his foresaids, shall neither require any declarator or process of law, nor be defeasible by me or my foresaids, by any offer to pay the sums before mentioned, at any time after the said 7th day of September next, but that, immediately after the lapse of that day, the said tack shall be deemed and held as absolutely and irredeemably sold and conveyed to the said Hugh O’Rourk and his foresaids for the sum of £200, being the agreed price for the same, on he or they paying or consigning the balance thereof in the manner after mentioned.’ Soon after the date of this assignation Rowley died; and on the 11th of September 1807, no part of the £150, or of the interest thereof, having been paid, O’Rourk, in presence of a notary public and witnesses, tendered to Mrs. Rowley, the widow of the deceased, £45: 14: 9, being the balance of the £50, after deducting interest and expenses, on her purging three arrestments which had been used in his hands, and granting a proper assignation. This not being accepted, he next day consigned the above sum in the Royal Bank of Glasgow. He then raised a multiplepoinding before the Magistrates of Glasgow, in which he called the arresting creditors and Rowley’s widow and children, and concluded to have it found that the power of redemption had ceased by consignment of the balance of the £50 forming the fund in medio, and that from thenceforth the tack became his absolute and irredeemable property. In terms of this conclusion, the Magistrates found that the right of the lease was effectually

and irredeemably vested in O'Rourk's person, and they then proceeded to settle the several claims of preference on the sum consigned. In 1890, O'Rourk offered the lease by missive to Young for £170; and the latter having accepted the offer, an assignation was executed by O'Rourk; but Young refused to pay the first instalment of the price, which it had been stipulated should be paid when the assignation was signed. O'Rourk then raised a summons before the Magistrates of Glasgow for payment, or for damages in the event of Young's failure to implement the bargain, to which he was allowed to add an amendment, concluding that he should also in that event be entitled to cancel the missives. Young pleaded in defence,—1. That O'Rourk could not grant a valid title, in respect that the assignation from Rowley was merely a conveyance in security, a *pactum legis commissariæ in pignori-bus*, and that the right could only be made absolute in the person of O'Rourk by a declarator foreclosing the power of redemption. —2. That the requisition and tender made by O'Rourk was quite ineffectual, because it was made to the widow instead of the son of the reverser, who besides was in pupillarity, without tutors; —and, 3. That the proceedings before the Magistrates were ineffectual to foreclose the right of redemption, because they had no jurisdiction to declare the forfeiture of an heritable right, and because the children who were in right of the claim of reversion were pupils, without tutors, and no tutor *ad litem* had been appointed to them. To this it was answered by O'Rourk,—1. That the covenant between Rowley and him was not a mere assignation in security, but was in fact a sale of the lease for £200, liable to suspension on Rowley repaying the £150 by a stipulated day, and that this not having been done, the sale took effect without the necessity of any declarator of redemption or process of law, so that it was unnecessary to discuss the question of jurisdiction; —and, 2. That the requisition and tender, and other proceedings, were only of importance as evidence that the remaining £50 of the price had been paid. The Magistrates having decerned against Young, he brought an advocacy, in which the Lord Ordinary advocated the cause, and decerned against him for the agreed on price; and the Court, 'in respect there was no necessity for a declarator,' unanimously adhered.

The Judges concurred with the Lord Ordinary in holding the transaction between Rowley and O'Rourk to have been in fact a sale of the lease for £200, suspended till the arrival of a certain day, when it became absolute, if not then voided by the repayment of the £150, and that nothing was requisite to make the right abso-

lute but the lapse of the period without such repayment, and evidence of consignment of the balance of the price by O'Rourke. Their Lordships were also agreed, that the Magistrates of a burgh had no jurisdiction in regard to a conclusion of declarator of forfeiture of right of redemption, such as that contained in the process of multiplepoinding, or for cancelling documents as in the other action, which in fact amounted to a conclusion for reduction of the missives.

*Advocator's Authorities.*—2. Ersk. 8. 14; 2. Bell, 384; Whitehill, June 21. 1699, (7210); Lord Elibank, July 1767, (7241.)

*Respondent's Authorities.*—2. Ersk. 5. 25; Dundas, Dec. 14. 1714, (7269); Young, March 9. 1785, (14191.)

J. FORMAN, W. S.—W. and A. G. ELLIS, W. S.—Agents.

No. 386.      Mrs. M. B. M'NEIL, Pursuer.—*Moncreiff—Rutherford*.  
H. F. M'NEIL, Defender.—*M'Neill*.

*Compound Interest.*—Circumstances in which the debtor in a bond was found liable in compound interest by biennial accumulation.

**May 26. 1826.**      IN 1787 the late Daniel M'Neil of Gallochhillly granted an heritable bond for £1000 to the late Dr. M'Neil of Stevenson. Besides this debt, Daniel M'Neil owed to the Doctor other sums, and in December 1811 the heritable and personal debts had, by arrears of interest, amounted to £2922. At this period the defender succeeded to his father, Daniel M'Neil; and on the 25th of December 1811 he entered into a transaction with Dr. M'Neil, by which he prevailed on the latter to sign a discharge of the bond and all claims whatever, in consideration of granting to him a bill for £230, and a bond for an annuity at the rate of 7½ per cent. of the debt during Dr. M'Neil's lifetime. This person was at that time upwards of 80 years of age; and the transaction having been immediately discovered by some of his friends, he conveyed the debts to trustees for his own behoof. These trustees forthwith executed a summons of reduction of the discharge, and Lord Alloway, on the 24th of June 1814, decerned in terms of the libel, in respect that Dr. M'Neil was a man far advanced in years; that there was no person present upon his part when the transaction was entered into, although there was a man of business present on the part of the defender, by whom the discharge was written in probative form; that the defender kept this document, but only gave Dr. M'Neil an improbable scroff, whereby the defender could have suppressed all evidence of the obligation undertaken by him; that accounts were not adjusted, nor the

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**Lord Eldon.**  
**D.**

balance ascertained, when the transaction was made; that on the day on which this occurred, intimation was made, on behalf of Dr. M'Neil, to the defender, that the transaction had not been understood by him, and that he had offered to restore the bill; that it appeared that his understanding was, that the whole balance of principal, after deducting the bill of £230, was to be converted into a perpetual annuity at  $7\frac{1}{2}$  per cent., whereas the defender had only bound himself to give an annuity during Dr. M'Neil's life; 'that an annuity at the rate of  $7\frac{1}{2}$  per cent. to a man of so great an age as Dr. M'Neil was a most unequal and unfair transaction, as the life of Dr. M'Neil at his age was not insurable, and  $2\frac{1}{2}$  per cent. above the ordinary interest afforded no compensation for the sinking of the principal for such an annuity during the Doctor's life; that a large part of the debt due by the defender to Dr. M'Neil was secured by heritable bond and infestment, whereas this agreement for sinking the balance into an annuity does not even stipulate heritable security for the payment of that annuity in lieu of the heritable debt, which was to be thereby extinguished.' To this interdictor the Court adhered, and it was affirmed by the House of Lords on the 21st of May 1824.

Dr. M'Neil had conveyed his whole estates in favour of the pursuer, and in 1817 she brought an action for payment of the bond, and demanded to have the interest on the debt annually accumulated, so as to produce compound interest from such period as should appear to be just. In support of this demand, she admitted that the general rule was against her, but that there were certain exceptions, of which this was one, in which the Court, on equitable principles, awarded compound interest; that in this case the defender had, by his own fraud in obtaining the discharge, and by endeavouring to support it, kept possession of the money, contrary to the consent of the creditor, for a series of years; that he was bound to have paid the interest at the intermediate terms of payment; and that it was therefore just that that interest should be added annually to the capital, and interest charged on the accumulated sum. To this it was answered, That no case had hitherto occurred in which compound interest had been allowed as between debtor and creditor; that the discharge had not been fraudulently obtained; that it had been set aside merely on account of the inequality of the transaction; and that even although it had been fraudulent, this was not relevant to infer a liability for that which was not sanctioned by law. The Lord Ordinary 'repelled the claim of the pursuer for compound interest on the heritable debt libelled;' but the Court

altered, and found the defender liable in compound interest, by biennial accumulations, from the 25th of December 1811, the date of the discharge which had been set aside.

**LORD HERMAND.**—I am perfectly clear that accumulation must take place in this case, and, indeed, I never saw one where it was more justly due. There may, however, be some difficulty as to how often the accumulation should be made.

**LORD CRAIGIE.**—If we are to sustain this claim, we must give effect to a demand for compound interest in every case. Here the party was reponed against the transaction in 1811, and then the claim is made on the bond. Now, if we are to hold that compound interest is due, then we must equally hold, that wherever any right is set aside on account of the fraud, compound interest will be exigible. Of this, however, I have considerable doubts.

**LORD BALGRAY.**—All cases of this nature depend upon their own circumstances. If the creditor allow his claim to lie over, it would be inequitable to burden the debtor with compound interest; and accordingly this is never done, except where an adjudication has been led, or where the parties are trustees, whose duty it is to accumulate for behoof of their constituent. But although the general rule is against compound interest, yet where a person most improperly and fraudulently, and against the will of the creditor, retains his money, is he not to be liable in accumulation? He is in fact putting into his pocket the profits of that interest which ought to have been in the creditor's, and therefore I am quite clear that accumulation in this case is due.

**LORD GILLIES.**—The general rule stated by Lord Craigie is right as to ordinary cases; but I concur with Lord Balgray as to this one. Here there was a bond in 1787, which was held at simple interest till 1811, when it was accumulated. Now if the creditor had delayed to exact his money, he would not have been entitled to compound interest; but his hands were tied up by the fraudulent act of the defender. We are therefore entitled to hold, that if such had not been the case, he would have recovered the contents of the bond. The defender, instead of abandoning the discharge fraudulently acquired, attempted to support it; but it was set aside by a Court of Law. I am clear, therefore, that accumulation must take place; but there may be some difficulty as to fixing the period.

**LORD PRESIDENT.**—I had at first some doubts in this case; but I am now satisfied that the demand of the pursuer is just. I think that accumulation may be made every two years from the 25th of December 1811, when the transaction with Dr. M'Neil took place.

In this proposal the other Judges, who were of the same opinion as to acquiescence, concurred.

*Pursuer's Authorities.*—Hamilton, Feb. 23. 1813, (F. C.); L. Montgomery against Wanchope, April 1816, (Ho. of Lords); 11. Vesey, 92; Executors of D. of Queensberry, May 23. 1822, (ante, Vol. I. No. 486.)

J. SMYTH, W. S.—J. SWAN, W. S.—Agents.

R. WILSON, Advocate.—*Skene*—J. Henderson jun.

No. 387.

R. PATTIE, Respondent.—*Jardine*.

*Personal Objection.*—Held that the agent of a respondent in an advocacy having agreed to hold the letters executed, or else to proceed by protestation, and not having done so, and the letters having been executed, the respondent was barred from objecting to an irregularity in the citation.

On the 26th September last, Wilson presented a bill of advocacy of certain judgments of the Dean of Guild of St. Andrews, in a summary application at the instance of Pattie. The bill was passed on the 1st of December, and the letters expedite on the 3d, the day of compareance being the 9th of December. On the 3d the advocator's agent applied to the agent for the respondent, to know if he would prefer the advocacy to be executed as a summons, or proceed by protestation. In answer to this, the respondent's agent wrote that he would either put up a protestation, or consent to hold the letters as executed on the Monday following, being the 5th, but that he would prefer proceeding by protestation. On the 5th the advocator's agent sent to the respondent's agent printed copies of the letters, and remained in expectation of protestation being put up till the 13th, when, after a communication as to the nature of which the parties differed, he wrote to his country agent to execute the letters in common form. The letters were accordingly executed on the 15th, the respondent being cited to appear 'time and place specified in the said summons,' which, as already mentioned, was the 9th of December. The cause having been then enrolled before Lord Cringletie, it was objected by the respondent that the citation was irregular and inept, in so far as it called him to appear on a day which was past prior to the execution of the letters. To this it was answered,—1. That the execution of letters of advocacy is simply an intimation, and does not require that preciseness as to the day of appearance which is necessary in a summons;—and, 2. That the respondent was barred personally exceptione from stating the objection, by the agreement between the agents.

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Lord Cringletie.

In regard to this plea, the respondent stated, that the advocate having executed the letters, instead of availing himself of the consent to hold them as executed, the respondent was entitled to consider the arrangement as entirely departed from. The Lord Ordinary, 'in respect of the irregularity of the execution,' dismissed the advocacy, and decerned; but the Court, in respect of the correspondence between the agents, unanimously recalled his Lordship's interlocutor, and repelled the objection.

**LORD GLENLEE.**—It rather appeared to me, that even supposing the objection to lie, it would go no further than that this execution should be held inept, as if the letters had not been executed at all, but not that the process should be dismissed. The calling and enrolment would no doubt be void, but the letters would continue to operate as a sist of the Inferior Court judgment till protestation. There may perhaps be an absurdity in citing a man to a day that is past; but how is the respondent to get over the declaration of his agent, that he would hold them executed as on Monday the 5th? for he would have been obliged to hold them executed, though there had been no execution of any kind.

**LORD PITMILLY.**—We can scarcely go into the merits of this critical objection, as the correspondence is quite sufficient to fix the parties; and it is necessary, on that ground, to alter the interlocutor.

**LORD ALLOWAY.**—I think the interlocutor wrong on the merits, especially as what has been done here is the common practice in regard to letters of advocacy; but, at any rate, we cannot allow a party to plead objections contrary to his agreement.

**LORD JUSTICE-CLERK.**—I rest my opinion on the breach of the agreement by the agent, which ought not to be countenanced.

**P. PEARSON,—B. THOMSON,—Agents.**

No. 388.

**GEORGE PETER, Pursuer.—Pyper.**

**C. FRASER, Defender.—Maidment.**

**Process.**—Held competent to enrol before a Lord Ordinary of the one Division an action of transference and wakening having reference to another action before a Lord Ordinary of the other Division.

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1st DIVISION.  
Lord Eskin.

D.

THE late Charles Fraser brought a suspension against Peter, which came to depend before Lord Pitmilley, and who ordered informations to the Court. Thereafter Mr. Fraser died, and was succeeded by the defender as his heir-at-law. The process fell asleep, and a summons of transference and wakening was raised by Peter against the defender, which was enrolled before Lord



Alloway, who remitted the process to Lord Mackenzie ob contingentiam of the original action. A defence of no process having been stated to this summons, it was abandoned, and a new one was raised and enrolled before Lord Eldin; and a motion was made by Fraser to remit it to Lord Mackenzie. To this it was answered, that Lord Mackenzie was not Ordinary in the original cause, and that the former remit had been made to him per incuriam; that it was competent to his Lordship to waken the original process, and decern in statu quo; and that the regular course was to extract that decree, and produce it in the process depending before the Ordinary in the original cause. The Lord Ordinary wakened the process, and transferred it statu quo, and the Court adhered.

J. MORISON, W. S.—J. J. FRASER, W. S.—Agents.

W. TAYLOR, Petitioner.—*Shaw*.

No. 389.

J. KERR, Respondent.—*Christison*.

*Sequestration*.—A petition refused for recall of a sequestration, after the lapse of sixty days, on the allegation that it had been applied for by the petitioning creditor under the influence of error, and that a majority of the creditors were desirous to have it recalled.

IN February 1819 sequestration was awarded under the bankrupt act against the petitioner, on the application of Samuel Little, a creditor residing in Ireland; and the judgment to that effect was afterwards affirmed on appeal. In the month of February 1825, the petitioner presented a petition to the Court, in which he stated that Little had been entirely misled as to the nature of the application which had been made in his name; that he had conceived that it was merely the ordinary process in Scotland for constituting and making effectual a debt; that this circumstance had only recently come to the petitioner's knowledge; and he further stated, that a large majority of his creditors were desirous to have the sequestration terminated. He therefore prayed to have it recalled accordingly. This was opposed by Kerr, the trustee, on the ground, that after the lapse of sixty days from the date of the sequestration, it was incompetent to recall it, and that there was no evidence of the allegations made by the petitioner. The Court, in respect that there was no evidence of the concurrence of the whole creditors, refused the petition.

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1st DIVISION.

8.

C. F. DAVIDSON, W. S.—J. DUNLOP, W. S.—Agents.

No. 390.

T. BRUCE and Others, Suspenders.—*Jeffrey—H. Bruce.*REV. A. CARSTAIRS, Charger.—*Moncreiff—Marshall.*

*Grass Glebe—Stat. 1663, c. 21.*—Held that lands which had been in grass for upwards of 30 years, but which were of a rich soil, and had been formerly ploughed, and were kept in pasturage for the purpose of a dairy, were not grass lands in the sense of the above statute, and so not liable to be designed as a grass glebe.

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1st Division.

Lord Eldon.

H.

THE Reverend Andrew Carstairs, minister of the parish of Anstruther Wester, applied to the presbytery of St. Andrews to design to him a grass glebe in terms of the statute 1663, c. 21. The presbytery having accordingly allotted a piece of land situated within the burgh, and extending to two acres and one fall, Mr. Bruce and others, heritors of the parish, brought a suspension, on the ground,—1. That the lands which had been so designed were not church lands;—2. That they were not grass lands, but were arable lands;—3. That they were incorporate acres;—and, lastly, That they belonged partly to a kirk-session, and partly to a friendly society. In support of the allegation that the lands were arable, they stated that the field was part of an uncommonly fine haugh lying along the sea-shore, the whole of which was of the richest soil, and had long been brought into the highest state of cultivation; that about 30 years ago it had been regularly ploughed and cultivated as arable land, and was so described in the titles, but that since that time it had been possessed by a tenant who kept a dairy for supplying the neighbouring villages with milk, and that he had found it more profitable to sow it down with grass, and keep it in pasturage, than to employ it in rearing crops; that it had produced for many years a rent of from £5. 15s. to £6. 10s. per acre, and was at present let at upwards of £5. per acre; and that the adjoining lands were all in a high state of arable cultivation. It was therefore contended, that although the field was, in point of fact, in a state of pasturage, yet that, according to the true construction of the statute, it must be held to be arable land. In regard to the two other grounds of suspension, it was stated, that the field being situated within the boundaries of a royal burgh, and belonging, as it did in part, to the kirk-session of the parish, and in part to a friendly society called the Trades' Box Society of Anstruther Easter, which was incorporated in 1701, it must be regarded as falling under the description of 'incorporate acres,' and as mortified for the use of institutions falling under the description of hospitals mentioned in the statute 1644, c. 27. To these grounds of suspension it was answered,—1. That it was established by a regular series of titles that the field originally

belonged to the Priory of Pittenweem, and therefore must be regarded as church lands.—3. That it was admitted that the lands which had been designed were, in point of fact, grass lands; that, in excluding arable lands, the statute had reference, not to the quality of the soil, but to the purpose for which the lands were actually used at the date of the designation; that in this case the field had never been cultivated as arable for upwards of 40 years, and therefore could not fall under the exception of the statute.—3. That the field could not be regarded as being within the description of incorporate acres, from the circumstance of its being situated within a royal burgh, or belonging to a corporation, seeing that the lands themselves were not incorporate;—and, 4. That neither the kirk-session nor the friendly society could be regarded as an hospital, nor had the lands ever been mortified, but, on the contrary, held feu; and, besides, the statute 1644, c. 27, had been annulled by the general rescissory statute 1661, c. 15. The Lord Ordinary found ‘it not proved that the lands which have been designed to the charger are church lands, but that it is proved that the said lands are arable lands, properly so called in terms of the statute, and not grass lands, and that they have been mortified for pious purposes, and that they fall within the exception of the statute as to mortified lands and incorporate acres,’ and therefore suspended the letters simpliciter, and found the charger liable in expenses. The charger having reclaimed, the Court recalled ‘that part of the Lord Ordinary’s interlocutor which finds that the lands in question are not church lands, and that part also which finds the charger liable in expenses, and find no expenses due; but, quoad ultra, adhere to the said interlocutor.’

**LORD HERMAND.**—The lands in question are in a high state of cultivation, and produce a much greater value than if they were under the plough. They have been laid down in grass for 30 years with a view to a dairy. If the plough were to be put through them, they would not produce near the value which they do in their present state. I therefore cannot regard them as grass lands in the sense of the statute.

**LORD CRAIGIE.**—I am of the same opinion.

**LORD BALGRAY.**—I rather think the charger is right in all his positions, and that we must look on these lands as grass lands. They have been so for a great number of years, and are so at this moment. Now, it is settled by the decision in the case of Panbride, that if at the time of designation they are truly grass lands, they must be held to be so, although at a prior period they may have been cultivated. Neither can they be regarded as incorporate acres. It is true that

they were bought by and belong to a corporation, but they are not incorporate themselves, nor can they be regarded as mortified lands in the sense of the statute.

**LORD PRESIDENT.**—It will be observed, however, that they are situated within and form part of a royal burgh, and I therefore think that in that sense they may be regarded as incorporate. It is clear, however, that they are not grass lands.

**LORD GILLIES.**—I am satisfied that they are not grass lands according to the meaning of the statute. They were cultivated as arable lands originally, and then they were laid down in grass as being more advantageous. They are not naturally grass lands, but are rich lands, lying near a populous place, where, from the abundance of manure, they have been highly cultivated, and then thrown into pasturage as being the most profitable. Every farm, particularly in East Lothian, has such rich grass fields near to the house, but it certainly could never be intended that these were to be taken as grass lands.

*Suspenders' Authorities.*—(2.)—2. Ersk. 10. 62; Steel, Jan. 31. 1712, (5133); Connell on Par. 389; Grierson, June 26. 1778, (5162); Connell, 1896; 1. Elchies, 173—(3.)—2. Ersk. 10. 59; 2 St. 3. 40; 1649, c. 45.—(4.)—1644, c. 27.

*Charger's Authorities.*—(2.)—Steel, July 27. 1748, (5161); M. of Dunfermline, June 20. 1721, (Elch. Glebe, No. 5); Hodges, Feb. 27. 1765, (5162); Peebles, June 23. 1784, (5163); M. of Panbride, May 18. 1809, (F. C.)

**KER and DICKSON, W. S.—J. and C. NAIRNE, W. S.—Agents.**

No. 391. **W. HYND and W. LOUDEN, Suspenders.—Moncreiff—Rutherford**  
**J. SOOT, Charger.—Jameson—J. Henderson jun.**

*Diligence—Penalty.*—Competent to charge on the penalty in a registered obligation, to the extent of reasonable expenses incurred in consequence of non-implementation.

**May 30. 1826.** **HYND** purchased at a public roup, for himself and certain other persons, a lease which formed part of a sequestrated estate on which **Soot** was trustee. By the articles of roup, (which contained a clause of registration,) the exposor and purchasers bound themselves to implement the different stipulations under a penalty of £100. The purchasers having refused to perform the bargain, **Soot** charged **Hynd** and **Louden** (who alone had signed the minutes binding the parties) for implement, and for payment of the £100 of penalty, restricting the latter to an account of expenses incurred chiefly in requiring under protest the parties for whom **Hynd** had declared that he made the purchase to implement the bargain, and in raising a horning. Of this charge **Hynd**

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**Lord Cringetie.**  
**B.**

and Loudon presented a bill of suspension, on the ground that it was incompetent to charge under a penalty for an account of expenses not constituted in an ordinary action, or at least not taxed or modified in a competent form. The bill having been passed, and the letters expedite, the Lord Ordinary, 'in respect the charge is given not upon a bond, but upon a contract, found the letters orderly proceeded to the extent of the charger's reasonable expenses,' and appointed an account thereof to be given in to be taxed by the auditor; and the Court adhered, except as to the ratio assigned by the Lord Ordinary.

The Judges were unanimously of opinion that a party was entitled to give a charge under the penalty in an obligation with a clause of registration, whether bond or contract, to the extent of his reasonable expenses, the amount of which in this case would fall to be determined by the Lord Ordinary on considering the auditor's report, and was not at present under review of the Court.

RITCHIE and MILLER,—RAMSAY and IMME, W. 8.—Agents.

J. GAVIN, Pursuer.—*R. Bell.*  
J. KIRKPATRICK, Defender.—*Rutherford.*

No. 392.

*Trust—Title to Pursue.*—A party having conveyed, inter alia, a right of action to trustees, but not to their heirs, and the truster being dead, and the trust having fallen by the death of the trustees, and a creditor of the parties having the chief beneficial interest under the trust (one of whom was confirmed executor qua nearest of the truster) having adjudged their right—Held that the creditor was entitled to pursue the action.

THE late Miss Sime raised an action of count and reckoning against Kirkpatrick, in 1789, as to certain moveable funds, which, after having been appealed to the House of Lords, was again remitted to this Court. In the interim Miss Sime executed a deed of trust, conveying to trustees (one of whom was Mr. Clephane) and their assignees, but without any destination to their heirs, all her means and estate, and, inter alia, this action. The subjects of the trust, to the extent of two-thirds, were directed to be conveyed to Mr. and Mrs. Clephane in conjunct fee and liferent, and to their children in fee. Miss Sime died in 1815, and Clephane, the only surviving trustee, then assisted himself as pursuer in the action. He also died in 1825, leaving an only daughter, who had now the beneficiary interest in the fee of the trust-property to the extent of two-thirds. The trust having fallen on Mr. Clephane's death, his widow (who was Miss Sime's nearest relative) obtained a confirmation as her exe-

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Lord Cringletie.  
M'K.

cutrix qua nearest of kin, and in that character claimed to be sisted as pursuer in the action. Thereafter, she and her daughter having granted a bond for £3000 to Gavin, he brought a declarator and adjudication for the purpose of adjudging from them all right they might have to Miss Sime's effects; and having obtained decree, he claimed to sist himself as a pursuer. This was resisted by Kirkpatrick, who contended,—1. That the action having been conveyed to and taken up by the trustees, Miss Sime was completely divested; and the trust having lapsed by the decease of the trustees, who had not previously reconveyed to her representatives the trust-subjects, including this action, they could not be held as in bonis defuncti, and so could not be taken up by Mrs. Clephane's confirmation, agreeably to the case of *Drummond v. M'Kenzie*, but that a declarator and adjudication against the representatives of the trustees and Miss Sime, and all having interest, was necessary for this purpose;—and, 2. That Gavin's adjudication could only take what was in the person of Mrs. Clephane and her daughter, against whom they brought it, who, however, had not adopted the proper steps to vest themselves with the right to the action. To this it was answered,—1. That the death of the trustees left the subject to be taken up by Miss Sime's nearest of kin, in the same way as she herself could have done had she been alive, and that the case of *Drummond* differed from this so far as the subject conveyed in trust was heritable, and had been rendered feudal by infestment of the trustee, whereas the subject here was a jus actionis;—and, 2. That Mrs. Clephane and her daughter having a beneficiary right under the trust, they had a title to pursue the action, and their interest having been adjudged by Gavin, he was entitled to sist himself as a pursuer. The Lord Ordinary repelled the objection, and held Gavin sisted as a party, and the Court adhered.

**LORD GLENLEE.**—I cannot see any good objection to this interlocutor. The trust came to an end by the death of the trustees; the beneficial interest, however, was in favour of Mrs. Clephane and her daughter, and consequently the right to insist in this action properly belonged to the persons in whom the beneficial interest was vested. No doubt, if they had had no connexion with the granter, they must have raised an action to oblige the heirs to make up titles, but here it happens that they are the nearest of kin also. The trust was of that nature, that Miss Sime might have put an end to it, and carried on the action in her own name; and I think that her representatives are entitled to do the same.

**LORD ROBERTSON.**—Miss Sime might have put an end to the trust, and if she had done so, every thing would have been in bonis of

her at her death; but my difficulty is, that this trust ought to be taken out of the way, by having it declared in a proper action that it has come to an end.

**LORD ALLOWAY.**—I concur entirely with Lord Glenlee. All the trustees are dead, and the deed no longer exists, except as to those persons having an interest under it. Mrs. Clephane has a considerable interest, and if the trustees were alive, she could insist on their conveying to her. Her daughter also has a great interest under the deed, and both of these interests have been adjudged by Gavin, who is accordingly entitled to carry on the process to the extent of these interests. If the case of Drummond is to be founded on at all, it is in favour of the pursuers, as the Court there seemed to hold, that as to all personal claims, the party having the beneficiary interest under the trust was entitled to pursue them.

**LORDS JUSTICE-CLERK and PITMILLY** concurred.

*Defender's Authority.*—Drummond, June 30. 1758, (16206.)

**ANDERSON and WHITEHEAD, W. S.—Æ. M'BEAN, W. S.—Agents.**

**T. WARBURTON, Pursuer.**—*Gordon.*

**J. HAMILTON, W. S. Agent for Defender.**—*Monteith.*

No. 393.

*Writer's Hypothesis—Expenses.*—The agent in a suit where the parties had made a compromise, not entitled to decree in his own name for expenses found due to his client, who was subjected in a larger amount to his opponent by the same interlocutor, which also directed the one account to be deducted from the other.

IN an action at the instance of Warburton against Lord Strathmore, in which each party had failed in certain points litigated by them, the Lord Ordinary, on a remit to determine as to the mutual claims of expenses, found 'the pursuer liable in 'the expense of the discussion of the point relative to the English 'law,' and 'the defender liable in all the other expenses,' and remitted 'to the auditor to examine and tax the same, and directs 'him to deduct the smaller sum from the larger, and to report.' The mutual accounts of expenses found due were accordingly lodged. The pursuer's was taxed at £163: 17: 7, and Lord Strathmore's at £116: 11: 7, thus leaving a balance of about £47 in favour of the pursuer. In the mean time Lord Strathmore and the pursuer came to some arrangement of the matter in dispute; but Mr. Hamilton, his Lordship's agent, conceiving that he had a *jus quæsitum* in the expenses found due to his client, craved that decree might be allowed to go out for them in his name, and contended that his claim was not liable to be compensated by the counter expenses awarded against Lord Strathmore

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B.

for another part of the discussion, these forming a separate personal debt against his Lordship, which he could not by any arrangement set off with those found due to him, so as to defeat the agent's just right. The Lord Ordinary 'having heard parties' procurators 'on the demand made by Mr. Hamilton to have the decret for 'the expenses found due to the defender to go out and be extracted in his name—In respect these expenses were ordered to 'be audited, solely with the view of deducting them from the 'expenses found due to the pursuer, and no decree was given 'therefor to the defender, while, on the contrary, the sum of '£47: 5: 5 of expenses was awarded and found due to the pursuer,' refused Mr. Hamilton's demand, and decerned against the defender for the balance of the £47: 5: 5, in terms of the auditor's report; and the Court unanimously adhered.

**LORD JUSTICE-CLERK.**—No one can doubt the correctness of this interlocutor. The only puzzle arises from the wording of it, as it is clear that the Lord Ordinary intended that the one account should be deducted from the other, and decree pass only for the balance. There was no decree in favour of either party, and, without touching any of the previous cases founded on, we must adhere.

The other Judges concurred.

*Hamilton's Authorities.*—Smith, July 9. 1802, (F. C.); *White v. Ballantine*, Feb. 3. 1815, (not rep.); *Gibson v. Murdoch*, 1819, (not rep.); *M'Lean*, Jan. 29. 1824, (ante, Vol. III. No. 136.)

**P. IRVINE, W. S.—J. HAMILTON, W. S.—Agents.**

No. 394.

**D. DAVIDSON**, Complainer.—*Sol.-Gen. Hope—Forsyth.*

**C. M'KENZIE**, Respondent.—*D. of F. Cranstoun—M'Leod.*

*Freehold Qualification—Member of Parliament—Tutor.*—Circumstances in which an objection to a claim for enrolment as a freeholder, that the disposition founded on was granted by the tutors of a pupil sine decreto prætoria, was sustained.

May 31. 1826.

1st DIVISION.  
Lord Meadowbank.

D.

**MR. M'KENZIE** presented a claim of enrolment at the last Michaelmas meeting of freeholders for the county of Cromarty, claiming to be enrolled as liferenter of the lands of Braes and others, 'conform to a charter of resignation under the Great Seal 'of the said lands and others in favour of Sir Charles William 'Augustus Ross of Balnagown, Bart., dated the 3d day of February, and written to the seal and registrate, and also sealed the '29th day of April 1824; and conform to disposition of the said 'lands and others, dated the 12th day of March, and 12th and



' 23d days of April 1824, made and granted by the tutors of the said Charles William Augustus Ross, (who are also trustees for the late Sir Charles Ross of Balnagown, Bart.,) in favour of the claimant in liferent, containing an assignation to the unexecuted precept of sasine contained in the said Crown charter, and conform to instrument of sasine in favour of the claimant,' &c. Various objections were stated to the claim and title of Mr. M'Kenzie, to be immediately explained; and these having been rejected, Mr. Davidson, a freeholder, presented a petition and complaint, praying to have Mr. M'Kenzie struck off the roll.

From the titles produced by Mr. M'Kenzie, it appeared that the superiority had belonged in 1788 to a Mr. Urquhart, who conveyed it to a Mr. Brodie; and, after some intermediate conveyances, it was disposed to the late Sir Charles Ross. That gentleman executed a trust-deed of settlement, by which he conveyed to certain persons, as trustees, the whole heritable subjects ' which shall happen to belong to me at my decease, free and unlimited by any entail,' and which he appointed to be converted into money, ' to be paid by my said trustees to the daughters of my present marriage, Elizabeth, Amelia, Mary, and Louisa, and to any sons or son, and to any other daughter or daughters procreated or that may be procreated of my present or any future marriage, other than an heir or heirs succeeding to the entailed estates of Balnagown or Lamington, which heir or heirs shall have no part or share therein with younger brothers or sisters.' He also nominated the trustees to be tutors of all his children. After the death of Sir Charles Ross, it was discovered that an error had been committed in the sasine taken in favour of Mr. Urquhart, the original author; and this having been rectified, Mr. Brodie of new conveyed the superiority to Sir Charles William Augustus Ross, the only son and heir of entail of Sir Charles Ross; and titles were made up in his person. The trustees, as his tutors, then sold and conveyed the liferent of the superiority to Mr. M'Kenzie,—Sir Charles William being at this time in pupilarity. Against the claim and the titles of Mr. M'Kenzie it was objected by Mr. Davidson,—1. That the claim was unduly obscure in relation to the conveyance in favour of Mr. M'Kenzie, because it merely stated that it had been granted by ' the tutors of Sir Charles William Augustus Ross,' and did not mention their names, or whether they were tutors nominate, tutors at law, or tutors dative.—2. That the disposition in favour of Mr. M'Kenzie was blank as to the price or consideration given for the superiority, and therefore the deed was defective, as the contract was incomplete in so far as regarded the price or consi-

deration ;—and, 3. That his title was *ex facie* void and null, because tutors had no right to alienate the pupil's heritage without the authority of the Court ; that the Court of Freeholders were entitled to disregard a title *ex facie* null ; and that it was no defence to allege that the superiority had been nominally vested in the pupil, and truly belonged to the daughters and representatives of Sir Charles Ross. To this it was answered,—1. That the claim was sufficiently specific, and was not intended to contain a minute detail of all the circumstances connected with the title, but that the object of it was to serve merely as an index to these titles ; and therefore, as the date and place of registration were mentioned, the freeholders had received every information that was necessary to be given to them.—2. That an omission of the cause of granting does not annul a disposition duly signed and delivered ; that proof of payment of the consideration-money was competent aliunde ; and that it was established by a receipt that the money had actually been paid ;—and, 3. That the objection to the validity of the conveyance, as having been made by tutors, was competent only to the pupil, and the objection was *jus tertii* to the freeholders ; that he was now upwards of 14 years of age, and had, since the date of the meeting, executed a ratification ; and that, besides, the superiority truly belonged to the other representatives of Sir Charles Ross, and therefore the pupil was under a legal obligation to execute the conveyance, which was done for their behoof. The Court, on the report of the Lord Ordinary, sustained the complaint.

In pronouncing the above judgment, the Court seemed to be chiefly influenced by the circumstance of the title being granted by the tutors *sine decreto prætoris*, who, it was besides observed, had no feudal title.

*Complainer's Authorities.*—(1.)—16. Geo. II. c. 11. § 7 ; Bell on Election, 35.—(3.)—1. Stair, 6. 18 ; 1. Bank. 7. 29 ; 1. Ersk. 7. 17 ; Vere, Feb. 29. 1804, (16389) ; Gordon, Feb. 17. 1767, (8874) ; 1. Ersk. 7. 19 ; Bell, 238.

*Respondent's Authorities.*—(1.)—Bell, 35 ; Wight, 152 ; Bell, 250.—(3.)—1. Ersk. 7. 48 ; Elchies' Notes, 35 ; 27. Voet, 9. 12 ; 1. Ersk. 7. 17 ; Sutherland, Feb. 28. 1771, (No. 1. App. Sup. and Vas.) ; Cochran, Feb. 1. 1820, (not rep.) ; 1. Ersk. Pr. 7. 11 ; Bell, 244.

PATERSON and LAW, W.S.—T. MACKENZIE, W.S.—Agents.

J. BARKLEY, Complainer.—*Sol. Gen. Hope—Forsyth.*  
 R. M'LEOD, Respondent.—*D. of F. Cranstoun—Skene.*

No. 395.

*Freehold Qualification—Member of Parliament—Decree of Valuation.—Circumstances in which an objection to an ex facie regular certificate of valuation and decree of division was repelled.*

MR. BARKLEY having claimed on certain titles to be enrolled as a freeholder of the county of Cromarty, produced two certificates of valuation attested by the commissioners and clerk of supply, bearing that his lands were valued in the cess-books at more than £400 of valued rent. His claim having been rejected on grounds which were afterwards abandoned, he presented a petition and complaint, praying for warrant to be enrolled. In defence against this demand, M'Leod and others, objecting freeholders, now stated that they were ready to establish that the valuation, so far as regarded part of the lands, was erroneous; and in support of this they referred to certain proceedings which had taken place above sixty years ago, and to a decret-arbitral pronounced in 1775. To this it was answered,—1. That Mr. Barkley having produced an ex facie regular certificate of valuation and decree of division, it was not competent for the Court of Freeholders to attempt to set it aside by going into extrinsic evidence. —2. That the older books of supply having been lost in the course of certain violent political operations which took place in 1765, the commissioners of supply caused a new state of the valuation of the county to be made up, which was done, and afterwards approved of by them in 1775, and sanctioned at the same time by the Court of Freeholders; that the lands objected to had then been valued precisely in the way as expressed in the certificate of valuation founded on, and that since 1775 cess had been paid in terms of the adjustment then made, and the decree of the Court of Supply. It was therefore contended that that decree was supported by the positive prescription, and by the use of payment. The Court, on the report of the Lord Ordinary, sustained the complaint, and granted warrant to enrol accordingly. \*

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1st Division.  
 Lord Meadowbank.  
 D.

LORD HERMANN.—After the books of supply were lost, a new valuation was made upwards of forty years ago, and cess has since been paid upon the lands in question according to the valuation which was then made. It appears to me that the respondents have no case at all.

The other Judges concurred.

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\* Another case, M'Crae against M'Leod, was decided in the same way.

*Complainer's Authorities.*—Robertson, Aug. 2. 1770, (10964); Sawa, July 26. 1637, (10719); Wight, 290; Douglas, March 10. 1768, (8649); E. of Fife, June 16. 1774, (8665); Campbell, Dec. 14. 1790, (8652); Blackwell, July 4. 1822, (ante, Vol. I. No. 589.)

PATERSON and LAW, W. S.—T. MACKENZIE, W. S.—Agents.

No. 396. J. LAIDLAW, Pursuer.—*D. of F. Cranstown—Macfarlane.*  
T. HAMILTON, Defender.—*Moncreiff—Fullerton—Murray.*

*Sexennial Prescription.*—One of two joint obligants in a bill having deponed, after the lapse of six years, that he merely signed the bill at the request of the drawer, without receiving the value, that the value had been paid to the other acceptor, and that he had not paid the bill, held liable.

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1st Division.  
Lord Eldon.  
H.

ON the 15th of September 1823 Laidlaw executed a summons against Hamilton and Dickson, libelling on a bill accepted by them in his favour for £220, dated 24th January 1814, and payable one day after date. He also produced a document of the same date, subscribed by them and addressed to him, in which they stated, that ‘whereas you have advanced to us on our bill ‘to you of this date £220 sterling, being part of the sum of ‘£300 agreed to be lent to us by John Smith, shoemaker in ‘Prestonpans, and for which sum we agreed to give the said ‘John Smith an heritable bond, which we are not yet in condition ‘to do, the titles to our heritable subjects not being yet completed, therefore we hereby oblige ourselves to grant the said ‘heritable security as soon as you may think proper to desire ‘the same, and as soon as we are in condition so to do.’ This security, however, was never granted. Hamilton alone appeared, and in defence against the action he stated, that he had never received any value for the bill, but had been induced to subscribe it at the request of Laidlaw for behoof of Dickson, his father-in-law; that the bill was prescribed, and therefore the debt could only be proved by his writ or oath. The Lord Ordinary decerned against Dickson in absence, found that the bill was prescribed, but allowed Laidlaw to prove by the writ or oath of Hamilton that the debt concluded for was resting owing. A reference was then made to the oath of Hamilton, ‘that the defenders became ‘bound, jointly and severally, to pay to the pursuer £220 ‘sterling, being the contents of the bill libelled, on the 25th ‘January 1814: That neither the one nor the other has yet paid ‘the said sum, nor any part thereof, nor any of the interest due ‘thereon, and that the whole is still resting owing unpaid; and ‘he refers the verity of this averment to the oaths of the said

defenders respectively.' This reference having been sustained, Hamilton deponed, ' That the other defender is father-in-law ' to the deponent. And being shown the bill libelled on, depones ' that the subscription, ' Tho. Hamilton jun.' is his writing, and ' he signed it at the desire of Mr. Laidlaw : That he never paid ' the bill, nor any interest, nor any part of it : That he never ' heard of Mr. Laidlaw discharging that debt : That he went ' with Mr. Dickson to Mr. Laidlaw's, to the meeting at which the ' bill was signed : That he did so at the desire of Mr. Dickson, ' who was very little acquainted with Mr. Laidlaw : That, so far ' as the deponent can recollect at this distance of time, Mr. Dickson ' communicated to Mr. Laidlaw the purpose of his waiting on ' him. Interrogated, Whether Mr. Laidlaw said that he would ' not advance the money, unless he, the deponent, joined ' in the security? depones, that, so far as he recollects, the res ' gesta was as follows: After Mr. Dickson had mentioned the ' business upon which he had come, Mr. Laidlaw rang the bell, ' and a clerk came up, to whom he dictated the terms of the bill, ' which the deponent observed was addressed to him and Mr. ' Dickson jointly: That he immediately said to Mr. Laidlaw ' that he was not prepared for this: That Mr. Dickson had ' never asked him to join in the bill, and that he had only ac- ' companied him there, because the deponent was better ac- ' quainted with Mr. Laidlaw; and Mr. Dickson then said, ' that he considered that Mr. Laidlaw had full authority, by the ' letter which he had delivered him from Mr. Smith, to advance ' the money on his own security: That the deponent expressed ' great reluctance to sign this bill, and Mr. Laidlaw explained, ' that it was only as an interim security that his name was re- ' quired till the titles could be made up to a property to which ' Mr. Dickson was to have right, when a bond was to be granted ' over it for the money advanced by Mr. Smith: That he did not ' like to hold out after this explanation, and he signed the bill, ' but still under the express understanding that the security for ' the money was to be granted as soon as Mr. Dickson's property ' was in a condition for it: That after leaving Mr. Laidlaw's, ' he being impressed with a notion that his father-in-law had pre- ' viously concerted with Mr. Laidlaw that he was to be a joint ' obligant, the deponent expressed to Mr. Dickson his disappro- ' bation of having been brought in in that way, but he was as- ' sured by him that that was not the case: That he had never said ' any thing of the kind to Mr. Laidlaw; and that he considered ' the letter he got from Mr. Smith quite sufficient authority for ' Mr. Laidlaw to advance him the money, without any other

' security than his own : That the deponent had been but a few  
 ' months married, and had never had any conversation on pecu-  
 ' niary matters with his father-in-law, who was also his uncle,  
 ' before that meeting; and he was, on that account, more sur-  
 ' prised at being applied to in the way he was, still supposing,  
 ' or being impressed with the notion, that it was at his father-in-  
 ' law's suggestion Mr. Laidlaw had asked him to join in the se-  
 ' curity; but he perfectly believed, after the explanation given  
 ' him by his father-in-law, that no such understanding had been  
 ' between him and Mr. Laidlaw. Interrogated by the commis-  
 ' sioner, depones, that Mr. Laidlaw was man of business for  
 ' Mr. Dickson, for the deponent, and for the trustees of his  
 ' uncle: That he had the management of the whole affairs of  
 ' the family,—was in possession of the title-deeds, and was the  
 ' person who was to prepare the security to be granted over Mr.  
 ' Dickson's property for the sum advanced by Mr. Smith:  
 ' That the deponent more than once spoke to Mr. Laidlaw about  
 ' getting this security made out; and he recollects, in particular,  
 ' a conversation he had with him on the Earthen Mound, that when  
 ' he expressed his anxiety about getting the security completed,  
 ' Mr. Laidlaw asked him whether his father-in-law was not  
 ' rich? and the deponent answered, that he might or might not,  
 ' but it was desirable that the business should be settled: That  
 ' Mr. Laidlaw gave as an excuse the hurry of the session, but  
 ' said that it should be done in the vacation.—Upon reading  
 ' over the deposition, it was stated by the counsel for Mr. Laid-  
 ' law, that the questions put by the commissioner, which had  
 ' been put in the counsel's absence, ought not to have been put;  
 ' and he protested that the answers should not be received as  
 ' evidence as on an oath of reference, or in any other respect.  
 The Lord Ordinary having appointed Dickson also to be ex-  
 ' amined on the reference, he deponed, ' that he was paid the sum  
 ' in the bill by Mr. Laidlaw, the pursuer, in consequence of a  
 ' line he had from Mr. Smith in Prestonpans. Depones, that  
 ' he never repaid the money to Mr. Laidlaw; and he considers  
 ' it as a debt still due by him, the deponent, to Mr. Laidlaw.'  
 On advising these depositions, the Lord Ordinary assolvizied Hamil-  
 ' ton; and on advising a representation he refused it, and issued  
 the following note:—' In this case a bill of exchange was granted  
 ' by Dickson and Hamilton to Mr. Laidlaw. It was allowed to  
 ' prescribe, and the creditor had no means of proving the debt,  
 ' but by the oaths of the acceptors. Hamilton deponed that he  
 ' had subscribed the bill as an acceptor, and that he had never  
 ' paid it, and never heard that Mr. Laidlaw discharged the debt.

‘ But he does not say that he received money for the bill, nor even that Dickson received money for it; and he does not say that Dickson paid, or did not pay, the contents of the bill. Thus the deposition proves nothing. Dickson depones that the bill was subscribed by him; that he received the sum contained in the bill, and never paid it back; and he considers it as a debt still due by him to Mr. Laidlaw. This is all, and it is no more than the evidence of one witness, to the effect that the money had been paid to Dickson. It is not an oath of the party to whom the reference was made. Several cases are quoted in the representation, but one only need be noticed,—the case of *M’Neil and Others v. Blair*, 21st January 1825, *Shaw’s Reports*. I am not able to follow the doctrine laid down in the report.’

Laidlaw then reclaimed, and contended that it was proved by the oath of Hamilton that the money had been advanced on the faith of the bill accepted by him jointly with Dickson; that this formed as effectual an onerous obligation of debt against him as it did against Dickson; that he did not pretend that he had paid the debt, and Dickson deponed that it had not been paid by him, so that it was clearly resting owing, and the debt contained in the bill had been proved in terms of the statute; and he relied on *M’Neil and Others v. Blair*, 21st January 1825. To this it was answered, That the bill was now extinguished by the lapse of six years, and could not be regarded as an existing document to any effect whatever; that such being the case, it was incumbent to prove the existence of a debt, but that the oath established that no money had been received by Hamilton, and that no onerous obligation whatever existed; and with regard to the case of *Blair*, it had been compromised for one half of the sum decerned for, after an appeal had been entered, and therefore could not be looked on as a binding authority. The Court, by a majority, altered, and decerned in terms of the libel.

**LORD CRAIGIE.**—The action here is laid on the bill alone, and it appears to me that the object of the statute was to prevent any action being sustained, founded on a bill, after the lapse of six years from the term of payment. I am perfectly aware that there has been a laxity in our procedure in that respect; but I think that a defender in such action is entitled to have it dismissed, and to refuse to say a single word except on oath. We therefore cannot pay any regard whatever to the original document, and consequently there are no grounds of decision, except the oath itself. The debt is clearly distinguishable from the bill. Thus, for example, a bill may have been granted by a tenant for rent, and it may be pre-

scribed. The landlord has no title to claim on the bill, but he may have recourse to his lease, and require the tenant to show his discharge. In short, the bill, being *literarum obligatio*, is at an end the moment that the six years expire. The question therefore is, whether the debt be proved, in terms of the statute, in this case? Hamilton denies that he received any money from the pursuer, and therefore recourse has been had to the oath of Dickson; but he must be regarded as a third party, and it is not competent to prove the debt against Hamilton by his oath. The case of Blair was taken to appeal, and was afterwards compromised at a considerable sacrifice.

**LORD PRESIDENT.**—I do not found on the bill as a document of debt, but I merely point to it as demonstrative or illustrative of the question put to the defender, that question being, Do you owe the debt expressed in that bill? Now, both admit that they came under an obligation to pay that debt, and both depone that they did not pay. If so, surely the debt must be resting owing.

**LORD GILLIES.**—The case of Blair is certainly very strong; but I am a good deal influenced by what has been stated by Lord Craigie. On reading the oath carefully, it will be seen that no debt is admitted. If he had said that he had incurred a debt, good and well; but what he says is, that he was only asked to put his name to the bill after all the arrangements had been made as to paying the money to Dickson,—that he was somewhat taken by surprise, and put his name to the bill, on the supposition that it was for a mere temporary purpose. It is therefore only from the acceptance of the bill that a debt can be inferred against him; but that acceptance must now be entirely disregarded, and he denies the debt, as he got no value.

**LORD BALGRAY.**—By the statute it is declared competent to prove the debt contained in the bill, by referring to writ or oath. Now, the question which is here put to Hamilton is, Did you not bind yourself to pay the debt contained in this bill? He admits that he signed it as an acceptor; and then he gives a long irrelevant story, to show that he does not consider himself liable for the debt. But we cannot listen to that, and he admits that he has not paid the debt. I cannot concur with the minority of the Judges in the case of Blair.

**LORD HERMAND** concurred with the Lords President and Balgray.

*Pursuer's Authorities.*—Philip v. Milne, Jan. 15. 1800, (No. 9. Ap. B. of Ex.); M'Neil v. Blair, Jan. 21. 1825, (ante, Vol. III. No. 325.)

J. L. MITCHELL, W. S.—JAMES BRIDGES, W. S.—Agents.



EARL of KINTORE and Others, Pursuers.—*D. of F. Cranstoun* No. 397.  
—*Skene.*

J. FORBES and Others, Defenders.—*Thomson—Lumsden.*

*Salmon-Fishing.—Stake-nets not prohibited on the proper shore of the sea.*

FORBES and other proprietors of estates, with rights of salmon-fishing on the shore of the German ocean to the north of the river Don, which flows into the sea without any frith or estuary, having erected stake-nets on the sea-shore on their several properties, within from about ten to two miles, or somewhat less, from the mouth of the river, the Earl of Kintore and others, proprietors of salmon-fishings in the Don, raised an action, founded on the various statutes quoted below, to have it declared that Forbes, &c. were not entitled to use stake-nets or similar machinery 'within the salt water that ebbs and flows, and upon the sand and schaulds adjacent thereto,' and to have them ordained to remove the same. The pursuers were met with an objection to their title to pursue, viz. that they had no common property or interest, such as proprietors in the same river have, to entitle them to interfere, (which, it was alleged, was the ground of sustaining the title in the Tay and Leven cases,) and that they could qualify no substantial interest to put down the stake-nets erected by the defenders. In answer to this, the pursuers offered to prove that their fishings had suffered or were liable to suffer injury by the erection of the defenders' stake-nets; and they pleaded, that having thus an interest, they were entitled to challenge any illegal operation by which they suffered injury in the exercise of their just rights. On the merits they pleaded, that the terms of the several statutes prohibiting the use of machinery such as stake-nets extended to the shores of the sea, and particularly that these were included under the prohibitions against fishing in 'waters where the sea ebbs and flows,'—'salt water that ebbs and flows,' and within 'flood-mark of the sea,'—a construction confirmed by the circumstance that cruives and yairs in rivers were capable of regulation, which could not be applied to stake-nets or similar machinery in the sea, thus rendering it absolutely necessary to prohibit them entirely, as there were no means of effectually regulating them,—and that it appeared from Boece that a kind of machinery greatly resembling stake-nets had at an early period been used on the sea-shores of Scotland; but as they had been afterwards discontinued, this must be presumed to have happened in consequence of the enactment of the statutes founded on by the pursuers. On the other hand, it was maintained by the defenders that the restrictions must be strictly interpreted, and that the terms of the statutes were confined to rivers; that the word

May 21. 1826.

2d DIVISION.

Lord Mackenzie.

zie.

R.

'water' was constantly used in contradistinction to 'sea,' that 'waters where the sea ebbs and flows' were merely those rivers or parts of rivers where the tide ascended,—the term 'flood-mark of the sea,' as applied to such waters, being merely the point to which the influence of the tide reached, as appeared from the general tenor of the statutes, the contemporaneous grants of fishings, and the authorities of our institutional writers, especially those who lived near the period of many of these enactments, and also from the professed object of these statutes, viz. to preserve the young fry and breed of salmon, which were only liable to be injured by such machinery when placed in rivers; and that the machines mentioned by Boece were in existence after the passing of several of the acts founded on by the pursuers, showing that they were not struck at by such prohibitions. The Court, on the report of the Lord Ordinary, after a hearing in presence, assoilzied the defenders, 'in respect that the stake-nets and machinery complained of are confessedly erected and placed in the sea, and not in any river or estuary.'

**LORD GLENLEE.**—I do not think that the defenders are entitled to assume that the prohibitions relative to salmon-fishing are an interference with the natural rights of property. The right of salmon-fishing was never one of those arising as accessory to the right of property. It was a matter of so much interest, that from the earliest periods it was held to belong to the King, probably for the sake of peace. So far, therefore, from the statutes being looked on as infringing a natural right, the reverse is rather the case. At the same time, if the voces signatæ of the statutes do not admit the ocean, we must not strain them to have that effect. The question then comes to be, what is the meaning of 'waters?' Undoubtedly, in Scotch, a water may signify a river; but, without something in the context, showing that 'waters' and 'aquæ' actually meant rivers only, they cannot be confined to that construction. For we see that where the subject-matter could not apply to the sea, then the word river is used, as in the act 1696, for it would have been nonsense to talk of mill-dam dikes in the sea, though, if 'waters' were here used, it must likewise have been interpreted 'rivers,' and in the act 1597 rivers and waters are used in contradiction to each other. 'Waters,' therefore, is not limited to running waters alone; and applying this to the statutes, I do not think that the sea beyond the mouths of rivers is excluded. The statute 1469, though limited in duration, shows what the Legislature understood to be the law after the act of James I., (1424,) and appears to me explicitly to include the sea. How can I suppose that the Legislature would ordain cruives, &c. to be taken down within flood-mark of the sea, if not held

contrary to the former act? and I cannot restrict the words 'salt waters,' where the sea fills and ebbs, to rivers alone. It is said that the sea always ebbs and flows, and that this must mean places where the description is peculiar; but I suspect the terms allude to the place over which the tide passes, and not to the situation of the waters, and that it was meant to prohibit these machines from being set on that part of the shore over which the tide flowed and ebbed. On the whole, I cannot restrict the prohibitions to places within the mouths of rivers, although there may be situations where stake-nets would do so little injury, that no one could qualify an interest to challenge them.

**LORD JUSTICE-CLERK.**—This question, which is certainly of general importance, has been fully and ably argued, and the Court have taken time to consider their judgment. It is admitted on all hands, that the question raised by this summons, as to the legality of using stake-net machinery on the coasts of the sea for the purpose of catching salmon, is an open one, neither the decisions as to stake-nets in the Tay, nor those relative to any other rivers or places where interdicts have been applied for, having involved the point which is here to be decided. The case is therefore completely open, and I have entered into the consideration of the argument we have heard, free from any preconceived opinion. Two questions have been argued, viz. the title, or rather the interest of the pursuers to insist in the action, and the point whether stake-nets, situated as the pursuers aver and offer to prove those of the defenders are, can be lawfully used.

**1st, As to the title:**—There can be no doubt but that the title of the pursuers in respect of the defenders in the present case is different from that of the pursuers in regard to the defenders in the cases of the river Tay and the water of Leven. But, in the Tay case, the Court in general held, without going entirely on the abstract notion of a communion of property in the river, that as there was evidence of at least some injury to the upper fishings having arisen from the stake-nets, any proprietor of fishings in that river was entitled to complain of illegal machinery being used by any other proprietor. On the supposition that the stake-nets were illegal, it indeed appeared to me, that where the object was merely to have that illegal machinery abated, any proprietor of a fishery was entitled to insist in the action, without being obliged to wait for the result of the illegal practice that had been adopted. It is not denied that a very small portion of interest was held to be sufficient in the Tay and Leven cases; and as the real objection to the title seems truly to rest on the denial of the illegality, it does not occur to me (considering the offers here made to prove injury) that there are sufficient grounds to dismiss the action on the want of a title on the part of the pursuers to be at least heard in it.

2d, On the merits :—While it must now be held as settled law, that stake-nets of all descriptions, when set in rivers or estuaries to the fullest extent of their limits, are illegal, it is further contended that they are equally illegal and prohibited when set on the sea-shores, altogether apart, or even at the distances set forth in this case, from any river or fresh water whatever. If the pursuers' position be correct, there can be no qualification in regard to the local position of any stake-nets, as all are held by them to be pronounced illegal by the Scottish statutes, except those in the water of Solway, by an express provision of the act 1563; in short, if placed on any part of the eastern or western coast, or of any of the isles of Scotland, however remote from rivers, they must be deemed to be illegal machines, and (it must be presumed) can be abated at the suit of any proprietor of a fishing to which the salmon caught in such nets may by possibility be supposed to proceed, if not intercepted.

In considering the terms and effect of the different statutes that are relied upon by the pursuers in their original and now amended summons, I hold it to be indispensably necessary to examine the whole of the statutes that have been passed relative to illegal modes of fishing, and that a combined view of these enactments must be taken. Further, it appears to me, that in order to understand the true meaning of the language of the ancient Scottish statutes, we are not to resort to etymological science, or the classical meaning of words, or their use in general authors, either sacred or profane,—but to the phraseology of the Legislature itself, the language of collateral and contemporaneous deeds, and of our own older historians and institutional writers, as affording a key to the true meaning of the earlier statutes.

With regard, then, to the earliest statute referred to, that which Skene gives as one of Alexander II., but which, in Mr. Thomson's work, is entered as that of William the Lion, called in Skene '*Lex Aquarum*,' and in the latter work '*Assisa de Aquis*,'—I think that no reasonable doubt can be entertained that the term '*aqua*' in the original, and '*water*' in the translation, (evidently of great antiquity,) means a river, and has nothing to do with the sea.

We next have the statute of Robert I. c. 11; and attending to the words here used, for regulating '*croas vel piscarias vel stagna aut molendina in aquis ubi ascendit mare et se retrahit, et ubi salmunculi vel smolti, seu fria alterius generis piscium maris vel aquæ dulcis descendunt et ascendunt*;'—'*ita quod nulla frisa piscium impediatur ascendendo vel descendendo*,'—I can have as little doubt that what is here enacted as to the '*fishing of waters*' relates to river fishings affected by the tide, and does not touch fishings situated on the proper shores of the sea itself. It is not necessary to rest this construction on the object of the statute being

to preserve the fry and young salmon, the word 'waters,' to which the regulations are applied, evidently being used as synonymous with 'rivers,' including of course their diffusion in proper estuaries, the cruives, fishings, stanks, and mills in which rivers, where the sea 'comes and gangs,' the statute was meant to regulate. I apprehend, then, that we have here incontestable evidence of the meaning in which the terms water and waters were used in the early statutes, as being in fact set in contradistinction to the term sea, when it was intended to be used. Not to dwell on the other illustrations referred to by the defenders on this point, the reference to the translation of Boethius seems perfectly fair, where 'seas' and 'waters,' as affecting marches, are set in opposition to each other. And it is an important circumstance, as meeting an argument of the pursuers founded on the exception of the Solway, that this author gives the true origin of that term, 'the water of 'Solway,' which is notoriously not an arm of the sea alone, but a congregation of streams composing what is generally known by that name, and into which the sea at every tide enters, or 'comes and gangs,' in the language of the statute of King Robert. Unless, therefore, a special exception had been made of this water in the act of Queen Mary, the use of all fixed machinery within its bounds would most unquestionably have been held to be prohibited as in other tide rivers. Fraserfield's grant in the charter of King James VI., mentioning the 'water-mouth' of this river Don, also confirms the meaning of the term aqua or water, which indeed will be found, in Scotch conveyancing, to occur in denoting rivers much more frequently than the word fluvius; and as to this, the very cases in the retours referred to by the pursuers may be successfully turned against them.

The authority of Balfour (p. 545) is also quite decisive as to the distinct and separate meaning of the term 'water,' as contradistinguished from that of 'sea.' His 13th chapter is entitled in the rubric 'Anent fishing forenent the mouths of waters flowing 'into the sea.'

Such, then, being the meaning of the term water or waters in the early statutes, we proceed to those of later date, which continue the same system, and retain the same mode of expression; and, first, as to that of James I. (1424, c. 11.) It seems of little importance whether the word 'fresh' is held to be the true reading or not, (though that word certainly appears in the earliest editions and the Black Acts,) as it is manifest that the term waters here used refers expressly to rivers where the sea fills and ebbs. This is, in fact, a prohibition of what the statute of Robert only regulated. And it is of importance to observe, that the provision as to cruives in *fresh waters* which follows in the act, serves evidently to explain the true meaning of other acts where the term salt waters is used;

because here fresh waters are put in opposition or contradistinction to waters, or those parts of rivers where the sea fills and ebbs, and which are consequently impregnated with salt.

The subsequent act 1427, c. 6, prolonging that of 1424, in using the term 'waters that fills and ebbs,' cannot be viewed as conveying any other meaning than that of the former acts, being confined to rivers subject to the reflux of the tides. The next act 1457, c. 86, has manifest relation only to setting vessels, creels, or weirs to interrupt smolts in passing to the sea, and it can in no way whatever tend to affect operations in the ocean itself.

The notice which is taken by the defenders of the rubric or title of the act 1469, c. 38, in the ordinary edition of the statutes, 'of fish, salmon, grilse, trout, and nets in waters,' is not unimportant, since the body of it expressly uses the word *sewers*, as the places where the nets are prohibited to be set. But the purpose mainly found on the words of the prohibition 'of coupe, narrow mass netts, and prinnis, set into rivers that has course to the sea, or set within flood-mark of the sea,' as in fact establishing the illegality of the stake-nets used by the defenders. While it is clear that the engines enumerated in this act do fairly comprehend machinery such as stake-nets, I must entertain great doubts of these words applying to such engines as are actually placed in the sea; and removed from the mouth of rivers.—1. It seems quite manifest that the regulation or prohibition was intended to arrest an evil which was experienced, not in the sea, but in rivers. This is set forth in the principal part of what may be termed the preamble of the statute. 2. The words 'set in rivers that has course to the sea, or within flood-mark of the sea,' seem merely inserted to remove all doubt on the point; and it is impossible to suppose that if such engines were meant to be prohibited in the sea itself, it would not have been so directly provided in express terms. If the evil had been equally felt as to such machines in the sea or on the sea-shores, would it not have been expressly set forth?

As to the supposed inapplicability of any regulations with regard to tide fisheries, I think it is by no means apparent, as there seems nothing to prevent a cruive fishing to be exercised, although it may be within the reach of the influence of the tide. And here the grants of piscaria, noticed at the hearing, are important:—That to the monks of Paisley in the Leven, '*tam sursum sicutus maris ascendit*;'—that to the burgh of Cupar, '*in aqua de Leven ubi mare fluit et refluit*,' as well as that to Straton of Knox in 1474, '*piscarias nostras de nostra aqua de Belvis infra metam fluvii maris ejusdem aqua de Innerbervie*,' all going far to explain the meaning of the words in the act 1469, as in fact not derogating from the previous act 1424.

Then followed the act 1476, c. 6, (or 1477, c. 73,) re-enacting

the statute 1424, and making it perpetual; thus showing that the act 1469 had not created any extension of the law, and that a new code, extending the prohibition to the sea, had not been adopted, as otherwise this statute could not have been framed as it is.

The next act 1488, c. 16, is one of those relied on by the pursuers. But, with the exception of the additional words 'fish-dams,' and the word *and* prefixed to waters, the phraseology of this act is precisely similar to that of 1424. It is disputed whether 'fresh waters' should not have been there; but 'salt' is perhaps as correct a description of waters or rivers where the sea ebbs and flows; and as the remaining part of the act regulates cruives in fresh waters, it must apply only to such as were not within the reach of the tide, and had before been tolerated.

As to the act 1535, c. 17, containing no exception of cruives and yairs in the sea, it could not possibly be necessary to except them, while it only re-enacted former laws, in which no mention of such was made.

Then next comes the act 1563, c. 3, (or 68,) upon which the pursuers chiefly rely, and it certainly appears to me to be the strongest part of their case. It consists of two parts,—1. That which re-enacts the statute of James IV. (1488);—and, 2. That which makes a new and farther enactment. Now, as to the first, as the act professes to ratify and approve that of James IV., and expressly bears 'of which the tenour followe,' it is in my opinion a clear proposition, that any variation from the words of the recited act must be disregarded as proceeding from a clerical error; and we must therefore adopt as the true words, those of the original, viz. 'salt waters where the tide ebbs and flows,' and reject the words, 'salt waters that ebbs and flows.' This is the principle of the decision *Heritors of Don v. Town of Aberdeen*, January 26. 1665, (Stair,) in regard to the regulation of the width of cruive hecks; for 'the Lords found it was a mistake in writing out the act, and that instead of King David it should have expressed King Alexander, and so bore only three inches' instead of five. This part, therefore, of the act of Queen Mary must be held to leave the matter exactly as it stood before. As to the new and more extensive enactment,—that is to say, that 'all cruives and yairs that are set of late upon sands and shoals, far within the water where they were not before, that they be incontinent taen downe and put away; and the remanent cruives that are set and put upon the water sands to stand still while the first of October next to come, and incontinent after the said first day to be destroyed and put away for ever,'—it requires some attention.

It is here quite obvious that this additional enactment was, in the first place, to meet an illegal operation which had lately been introduced, namely, the setting of cruives and yairs upon sands and

shoals far within the water, and which are ordained to be instantly removed. But that this enactment does not apply to those that are situated on sands and shoals of the sea itself, seems evinced as well by the word 'water' alone being used, (which has been shown not to denote, but to be used in opposition to 'sea,') as by the use of the term 'water sands' in the subsequent words, relating to those cruives and yairs which had been placed there for a longer period of time. In short, this part of the statute seems to have been intended to meet a new device as to the position of the forbidden engines, viz. placing them on the sands and shoals of rivers where the sea ebbs and fills, and at a distance from the banks or sides of the river where they had at first been used. Had it been actually intended to declare all such machinery illegal, when placed on the sea-shores or sands, which are laid bare at certain periods of the tide, without reference to the vicinity of any river, it seems impossible but that plain and intelligible words to that effect would have been used. On considering, then, the terms of this statute, which seems to be especially relied on by the pursuers as decisive in their favour, it does not appear to me to warrant the conclusion deduced from it.

The act 1579, c. 89, merely enforces the former statutes, and extends the penalties and the powers of the Sheriff.

The act 1581, c. 111, though containing no new enactments, is certainly of considerable importance in reference to the true purpose of the prior acts. It empowers Justices and Sheriffs to discharge the duty imposed on them in a variety of defined districts into which the kingdom is divided, and the rivers in which are in almost all enumerated and assigned to individual functionaries, to one of whom the waters of Dee and Don are specially assigned; and as this duty applied to the destruction of the cruives and yairs referred to in all the acts of his Highness, I think there not being the remotest mention of sea-shores is of importance.

The last statute 1685, c. 20, is of little importance, and is admitted to be loosely worded in point of reference.

Having thus gone over the statutes, I shall now notice the language of some early decisions, which appear to go a considerable way in ascertaining the meaning of various passages which occur in several of the statutes founded on in this case. In *Leslie v. Aytoun*, June 29. 1593, (M. 14249,) it seems evident that the fishing there mentioned, which is described almost in the very words of the statutes 1424-1469, was a fishing, not in a sea, but in a river. This is still clearer in the next case, *Gairlies v. Torhouse*, July 30. 1605, (ibid.) as the language there used is applied to a river fishing where the sea filled or salt water came. And the same may be plainly inferred from the immediately succeeding case of *Gairlies v. M'Culloch*, March 1696. Another case is thus noticed by



Sir Thomas Hope: 'Found that salmond-fishing within the sea 'mark or floud mark appertaines only to the King as regale; and 'above the sea mark, any man being infest in his lands adjacent to 'the water, with the common clause cum piscationibus, and qualifi- 'cand possession of salmon-fishing, has right to the same, except 'some other be expressly infest cum piscationibus salmonum with- 'in the same bounds,' (c. 873.) Now 'the sea marke' here can only mean that part of the river to which the influence of the tide reaches; and the same conclusion arises from the terms of the early decision noticed by Balfour, (p. 545,) *The Queen v. Lady Innes*, April 12. 1559.

But that the interpretation of the statutes contended for by the pursuers, as containing a prohibition of the machinery in question, even when used on the proper shores of the sea, is unauthorized, seems manifest from the dicta of our most eminent writers upon law, especially the older authors, who must have been much better acquainted than we can be with the meaning of the phraseology used in these acts of Parliament.

Balfour, in analyzing the statutes under the article 'Fishing,' c. 7, has these words, 'cruives and yairs are forbidden in *fresh waters*;' and to what acts does he refer? Why, the very acts founded on by the pursuers, that of 1424, 1477, 1488, 1535, and 1563, the sheet-anchor on which they rely. Had he considered that such machinery was equally forbidden by these statutes in the sea or on its shores, it seems impossible to doubt but that, while treating on the general subject of salmon-fishings, he would have stated so in express terms, and pointed out by what acts the provision was introduced. And as to the statute 1469, which is so much relied on, it is only noticed by Balfour thus, (c. 12.) 'of fish; sal- 'mond grises, trouts, and netts in waters,' according to its own title in the statute-book, indicating nothing of an opinion of its application to the sea. The passage in Stair, b. 2. t. 3. § 70. is certainly quite exclusive of his opinion being in favour of the pursuers' argument. He is in this place an authority to the fact, that cruives and yairs in salt waters were a known mode of fishing; and therefore his statement of the law, as applicable to such as are 'within rivers in so far as the tide flows,' is extremely important in this case. He had in the preceding paragraph adverted to a fishing in salt water, and held it as importing a foundation of prescription of salmon-fishing in the sea at the *water mouth*, where they are frequently taken; and it is therefore inconceivable that he should have omitted to notice it, had it been law that all cruives and yairs in the open sea were also illegal and prohibited. And in like manner Bankton, Vol. I. p. 574, thus expresses himself:—'There 'is a particular manner of fishing salmon *in rivers* by cruives and 'yairs. These must not be placed within the sea-mark, where it

'for ordinary ebbs and flows;' giving no countenance to the extension of the statutes to cruives and yairs in the sea.

Such, then, being the state of the authorities in regard to these statutory enactments, in none of which is there to be found any indication of their being held to apply to the proper objects of the ocean; and as it is manifest that no decision has been pronounced tending to establish the illegality of stake-nets, when used not in rivers or estuaries or water mouths, but on the shores of the sea itself, it appears to me that the action at the pursuers' instance cannot be maintained, although I reserve my opinion as to nets placed so as to intercept the entrance of salmon into the river, according to the principle of the ancient case mentioned by Balfour, (*The Queen v. Lady Innes*, April 12. 1559,) but which is totally independent of the legality or illegality of the nets themselves.

The other Judges concurred entirely with the Lord Justice-Clerk.

*Statutes referred to by the Parties.*—Alex. II. c. 16, (or William the Lion); Rob. I. c. 12; 1424, c. 11. and 12; 1427, c. 6; 1429, c. 131, (c. 22. new edition); 1457, c. 86, (c. 33. 34. new edition); 1469, c. 38, (c. 12. new edition); 1477, c. 73, (1478, c. 6. new edition); 1488, c. 16; 1585, c. 17; 1568, c. 3; 1579, c. 89; 1581, c. 111; 1685, c. 20.

*Pursuers' Authorities.*—(Title).—Colquhoun, July 6. 1804, (14238); Earl of Kinnonll, January 26. 1802, (14801); Duke of Atholl, &c. March 7. 1812, (F. C.)

*Defenders' Authorities.*—(Title).—Duke of Hamilton, &c. July 12. 1724, (1824).—(Merits).—Balfour, Fr. p. 544; 2 Stair, 370; 2 Ersk. 6, 15; 1 Bank. 574.

**MONROSE and BURNETT, W. S.—A. YOUNGSON, W. S.—Agents.**

**No. 398. J. FORBES and D. H. FORBES, Pursuers.—*Moncroiff—Lynedea.*  
EARL of KINTORE and Others, Defenders.—*D. of F. Grantstown*  
—*Skene.***

*Salmon and Trout Fishing.*—Question as to the right of proprietors of a salmon cruive fishing to grant licenses to fish with the rod on the banks of the proprietors of estates not having a right of fishing, and to prevent those proprietors angling with the rod for trout on their own banks, sent to the Jury Court to ascertain the state of possession.

May 31. 1826.

2d DIVISION.

Lord Mackenzie.

zie.

M'K.

THE pursuers, as proprietors of lands on the river Don, but without any rights of fishing in their titles, raised an action against the Earl of Kintore and others, proprietors of the 'salmon-fishings of the cruives upon the water of Don, with the profits, privileges, and pertinents of the same, used and wont,' to have it found that the latter had no right to grant licenses to other persons, with or without consideration, to traverse the banks of the pursuers' lands, and fish for salmon or trout with the rod or otherwise, within the bounds of their property, but were only entitled to exercise their right of salmon-fishing of

cruives, or net and cobble; and that they (the pursuers) were, on the other hand, entitled to fish with the rod for trout, within the bounds of their respective estates, without interruption from the defenders. The defences were rested on usage and possession, as to which the parties were not agreed. The Lord Ordinary found, 'That the defenders have a sufficient title of right to catch salmon by any lawful method in the part of the river Don libelled; that, as a pertinent thereof, they have a secondary right to use the banks of the river, which are the property of the pursuers, as far as necessary, for the fair and reasonable exercise of the right of catching salmon; but that it does not appear from any facts or circumstances condescended on by the defenders, that the fair and reasonable exercise of this right requires that the salmon should be angled for with the rod in any part of the river libelled; therefore that the defenders have no right to grant license to any person to fish salmon with the rod in the part of the river Don libelled; and, a fortiori, that they have no right to grant license to any person to fish trout or other fish with the rod in the said part of the river Don;'—and decerned and declared accordingly, prohibiting them from granting such license in future. 'And with respect to the pursuers' claim, on their part, of fishing trout or other white fish in the river Don,' his Lordship remitted to the Jury Court, 'in order that the questions of fact regarding possession, and the alleged injurious effect of the pursuers' fishing for trout or other fish upon the salmon-fishing of the defenders, may be determined.' This interlocutor the Court, on the petition of the Earl of Kintore, &c. recalled; and their Lordships remitted to the Jury Court generally, that the facts on both points might be settled.

INGLIS and WEIR, W. S.—MORISON and BURNETT, W. S.—Agents.

J. Low, Advocate.—*Moncreiff—Robertson.*

LOD, ARBUTHNOT and Others, Respondents.—*Sol.-Gen. Hope*  
—*H. J. Robertson.*

No. 399.

*Title to Pursue.*—A committee of trustees under a local statute found entitled to pursue an action.

By an act of Parliament passed in 1796, the management of the statute labour and conversion money of the county of Kincardine is vested in trustees, who are not individually named, but described by certain qualifications. The county is by the statute divided into four districts, of which that of St. Cyrus is one; and the trustees are authorized to name a collector, accountable to

June 1. 1826.

1st Division.

Lord Eldon.

D.

them for his intromissions, and liable to an action before the Justices or the Sheriff of the county. It is also declared that any three of the trustees shall form a quorum; but there is no provision as to the form in which actions are to be brought. Low was appointed collector, in which office he continued for several years till 1818. An action was then brought against him before the Sheriff of Kincardine at the instance of 'The Right Honourable' the Viscount of Arbuthnot, James Scott, Esq. of Brothertown, 'John Brand, Esq. of Lawriestown, and Alexander Low, Esq. of Criggie, a committee of the trustees for the fourth or St. Cyrus district of commutation roads in Kincardineshire, appointed in terms of the minutes of the meetings of the trustees of said district, held,' &c. In this action they concluded for payment of a balance of £79:4:5½, according to an account rendered by Low, and for £121:16:11, being arrears which he alleged he had not recovered, but for which it did not appear he had done diligence. After a great deal of procedure, first in the Sheriff Court, and then in this Court, and thereafter on a remit to the Sheriff Court, where decree was pronounced in terms of the libel against Low, he brought an advocacy on various grounds,—but particularly that the respondents, as pursuers of the original action, had no title to insist, seeing that they pursued as a committee of the trustees under a special statute, whereas no such committee was recognised by the statute, nor authority given to appoint it, and the collector was accountable only to the trustees; that, besides, one of the respondents had disclaimed the action, and another was no longer a trustee, and therefore there was not a quorum; but even if there were a quorum, the action was not brought by them as such, nor was it declared competent by the statute for a quorum to pursue. To this it was answered, That the objection was too late, and that it was unfounded, because it was impracticable to raise an action in name of all the trustees, seeing that they were not named, but described by qualification, and that this qualification was frequently transferred from one person to another; that it was perfectly competent for the trustees at a regular meeting to authorize a committee to bring their collector to account, either judicially or extrajudicially, and that accordingly this had been done. The Lord Ordinary remitted simpliciter. Low having reclaimed, the Court repelled the objection to the title, and remitted to the Sheriff with instructions to hear Low on his defences in relation to the outstanding arrears, as to which he alleged he had done diligence without effect.

Sir J. MONTGOMERY, Complainer:—*Fullerton—Maitland.*  
E. SHAW, Respondent:—*Forsyth.*

No. 400.

*Freehold Qualification—Member of Parliament—Retour.*—1.—An objection repelled, that a retour produced to establish that lands were a forty shilling land of old extent did not prove this, seeing that it included a right of patronage, which did not belong to the claimant,—the extent of the lands being alone retoured;—and,—2.—An objection that one of the subjects specified in the descriptive clause was not valued, also repelled, the total value there mentioned agreeing with that in the valent clause.

At the last Michaelmas meeting of the freeholders of the stewartry of Kirkcudbright, the respondent presented a claim of enrolment on certain titles vesting him in the superiority of the three merk land of old extent of Drumrash; and along with these he produced an extract of a special retour of the service of Robert Viscount of Kenmure; as heir to John Viscount of Kenmure, Lord of Lochinvar, dated 14th January 1662. From the descriptive clause of this retour, it appeared that the ancestor died last vest and seised 'in totis et integris tribus mercatis terrarum antiqui extentus de Drumrash, cum suis pertinen., cum advocacione, donatione, et jure patronatus rectoris et vicarie ecclesie parochialis de Partoun; totis et integris quinque libratibus terrarum de Tralolan alias Glenlairis, cum molendinis granorum et fullonium earand. terris molendinariis, multuris et sequeis hujusmodi; totis et integris duabus mercatis terrarum de Ervie; tota et integra mercata terre de Barsell; quadraginta solidatis terrarum de Over Bordland de Nether Stell; terris de Glengunzeoch, ac terris vocat. Twenty shilling land; omnes jacen. in parochia de Partoun, et infra senescallatum de Kirkcudbright, cum omnibus et singulis suis castris, turribus,' &c. The valent clause of the retour was in these terms:—'Et quod omnes et singule predictae terrae, jacen. ut supra, extenden. ad duodecim libratas terrarum, valent nunc per annum summam triginta sex librarum monetæ hujus regni Scotiæ, et valuerunt tempore pacis summam duodecim librarum ejusdem monetæ; et quod predictae terrae extentus predict., jacen. ut supra, tenentur,' &c.—The freeholders having sustained the claim, and enrolled the respondent, Sir James Montgomery presented a petition and complaint, in which he maintained that the claim was objectionable,—1. Because the retour did not establish that Drumrash was a forty shilling land of old extent, seeing that it included the patronage of Partoun, which was valued in cumulo with the lands of Drumrash; and as that patronage was separated from these lands, and did not belong to the respondent, there was no

June 1. 1836.

1st Division.  
Lord Meadow-  
bank.  
S.

evidence that the lands were of the requisite value.—2. Because although the extent of the several lands specified in the descriptive clause amounted in all to £12, and it was stated in the valent clause that such was the cumulo extent, yet the lands of Glengunzeoch (which formed a distinct and substantive member of the subjects to which the retour applied) had no extent mentioned; and as this must have been done by omission, there was necessarily a discrepancy between the descriptive and valent clauses. To this it was answered,—1. That the value was confined to the lands, there being none put on the patronage; and accordingly the descriptive clause stated that the ancestor had died seised ‘in totis et integris tribus mercatis terrarum antiqui extentus de Drumrash, cum suis pertinen. cum advocacione, donatione, et jure patronatus rectoriæ vicariæ ecclesiæ parochialis de Partoun;’ and the valent clause bore,—‘Et quod omnes et singulæ prædictæ terræ, jacen. ut supra, extenden. ad duodecim mercatas terrarum;’ and that, besides, it was not customary to value a patronage which was not properly a feudal right.—2. That the descriptive clause and the valent clause corresponded with each other, and that it was to be presumed that the lands of Glengunzeoch were one and the same with that which was called twenty shilling land; and accordingly the retour affirmed that the whole portions of land had been valued. The Court, on the report of the Lord Ordinary, dismissed the complaint, and found expenses due.

*Complainer's Authorities.*—(1.)—Bell on Election, 191.—(2.)—Bell, 175; Scott, March 6, 1781, (8595); Wight, 170.

*Respondent's Authorities.*—(1.)—1. Ersk. 5, 15; Bell, 176; Davidson, March 9, 1808, (8599.)

CORRIE and WELSH, W. S.—T. GRIERSON, W. S.—Agents.

No. 401.

W. C. LEARMONTH, Advocate.—Jameson.

J. BAIRD and Others, Respondents.—Sol.-Gen. Hope—  
M'Neill.

*Process.*—A reclaiming note, not having been marked within the reclaiming days by an Inner-House clerk, refused as incompetent.

June 1, 1826.

1ST DIVISION.  
Lord Eldin.

D.

ON the 15th of November 1825 Lord Eldin pronounced an interlocutor, against which Baird and others boxed a reclaiming note on the last of the reclaiming days, being the 6th of December. The note was marked as boxed, and as having paid the fee-fund dues; but it was not marked by any of the clerks of the Inner-House, nor was it signed by counsel. The Court having,

on a motion by Baird and others, ordered Cases, it was objected in the Case for Learmonth, that the interlocutor was final, seeing that the reclaiming note had not been marked by an Inner-House clerk. The Court sustained the objection, and dismissed the note.

*Advocate's Authorities.*—A. S. November 12. 1825, § 3; Pratt, June 9. 1824, (ante, Vol. III. No. 85); Young, June 29. 1824, (ante, Vol. III. No. 134.)

A. PEARSON, W. S.—LINNING and NIVEN, W. S.—Agents.

A. ALLAN and Co. Pursuers.—*Sol.-Gen. Hope—Robertson.* No. 402.  
J. DUNDAS, Defender.—*Skene.*

*Cautiomer.*—A suspension of a charge on a bill of exchange, on the ground that the charger had agreed to accept of a composition, having been passed on caution for the composition, and the letters being found orderly proceeded to the full amount of the bill.—Held that the cautioner was liable to the extent of the composition.

ALLAN and COMPANY having charged Galloway on his acceptance for £362 : 7 : 6, he presented a bill of suspension, on the ground that they had agreed to accept a composition of five shillings in the pound. This bill was passed, on caution having been found to the extent of £90 : 11 : 10½, being the amount of the alleged composition on the debt. The bond of caution was as follows:—‘I James Dundas, accountant in Edinburgh, bind and oblige me, my heirs and successors, &c., as cautioner and surety, acted in the books of Council and Session, for William Galloway, merchant in Leith, to make payment to Alexander Allan and Company, bankers in Edinburgh, of £90 : 11 : 10½, being a composition on £362 : 7 : 6, with interest, contained in a bill, &c.; which composition is the extent of caution offered by the complainer in the suspension of the said bill, and that in case it shall be found by the Lords of Council and Session that he ought to do so, after discussing the letters of suspension to be raised in the said matter; and also that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses, in case of wrongous suspending.’ On discussing the letters, the Lord Ordinary repelled the reasons of suspension, and found the letters and charge orderly proceeded as to the whole amount of the bill. Thereupon Allan and Company demanded from Dundas payment of the amount for which he had become cautioner, and for the expenses of process which had been found due. But this having been refused, they raised the present action on the bond; in defence against which, Dundas pleaded that he had only become cautioner for the composition,

June 1. 1826.

2d DIVISION.  
Lord Mackenzie.  
M<sup>th</sup> K.

in case it should be found that a composition had been accepted; but that Galloway having been found liable, not for the composition, but for the whole debt, he could not be subjected in payment even to the extent of the composition, in the view of which being alone found due, he had become cautioner. The Lord Ordinary decerned against Dundas for the expenses, but assoilzied him quoad ultra. The Court, however, unanimously altered, and decerned in terms of the libel.

T. BRUCE jun. W. S.—J. B. FRASER,—Agents.

No. 403.

G. MORRISON, Pursuer.—*Jameson—J. Henderson jun.*  
ALEX. URE, Defender.—*Stene—Maitland.*

*Agent and Client—Reparation.*—A pursuer having lost his cause, in consequence of the proof not having been written on stamped paper, his agent found liable to indemnify him.

June 2. 1826.

1st Division.  
Lords Alloway  
and Eldin.  
D.

MORRISON employed Ure, a writer in Glasgow, to raise an action against certain of his debtors before the Sheriff of Lanarkshire. This was accordingly done; and decree in absence was obtained against all the defenders, except Daniel Christie, the claim against whom amounted only to £1 : 3 : 6. That person having maintained a defence denying the allegation on which the action was raised, the Sheriff allowed a proof, and granted commission to the depute-clerk to take it. Witnesses were accordingly adduced on the part of Morrison; but their depositions were not written on stamped paper, which was at that time requisite. After considerable litigation, in the course of which some of the pleadings for Morrison were not written upon stamped paper, and after an objection had been taken to these pleadings on that ground, the Sheriff decerned in his favour. Christie then appealed to the Circuit Court, where it was objected that the proof had not been written on stamped paper; and Lord Hermand, 'in respect that the proof in this case is written on unstamped paper, reversed the judgments appealed from, and assoilzied the defender.' In the mean while, Ure had obtained from Morrison a bill for the amount of his account, and having proceeded to do diligence upon it, and thrown him into gaol, Morrison brought an action both against Ure and the depute Sheriff-clerk, in which he stated, that 'for the wilful neglect or gross ignorance displayed in extending the said proof on unstamped paper, in contravention of the positive enactments of a public statute, which ought especially to be well known to the practitioners before and members of a court of law, the said Alexander Ure, as the procura-



'tor employed by the pursuer in the said cause, and the raiser and conductor thereof on his behalf, and James M'Hardy, depute-clerk of the said Sheriff Court of Lanarkshire, by whom the said proof was taken, are each or one or other of them chargeable and responsible, and are thereby liable to the pursuer in the loss and damage he has in consequence sustained.' In defence it was maintained by Ure,—1. That it was the proper duty of the clerk, acting as commissioner, to have caused the proof to be written on stamped paper; and that he, as agent, had no control in regulating the mode of extending the proof.—2. That it had been the invariable practice, in small cases depending before the Sheriff Court of Lanarkshire, to write the proof on unstamped paper; and that there being thus a communis error, he ought not to be subjected in damages, even supposing it were his duty to have attended to this matter;—and, 3. That the Sheriff before whom he practised disregarded the objection which was made to the want of stamps, and therefore he was entitled to plead the defence of auctor prætor. To this it was answered,—1. That Ure had been employed as agent to attend to the action, and to see that it was conducted in a regular manner; that he had accordingly demanded, and had attempted to exact by diligence, a remuneration for having so done; and that, as it was undoubted that it was necessary by law to have the proof written on stamped paper, he had been guilty either of culpable negligence, or of gross ignorance, in not having this done.—2. That both he and the sheriff-clerk were jointly liable, and might discuss their relief inter se;—and, 3. That the other defences were unfounded, because there had been no communis error to justify such a blunder, and the objection stated to the Sheriff was not to the proof, but to the pleadings, and he might have decided the cause without reference to them, and on the proof alone. Lord Alloway repelled the defences for Ure, and found 'him liable to the pursuer for the loss sustained by him, in consequence of the proof having been written on unstamped paper,' and appointed the pursuer to state the amount of his loss, and made avizandum with regard to the claim against Mr. M'Hardy. Lord Eldin altered this interlocutor, and assoilzied the defenders, 'in respect the damages, if any have been incurred, were not occasioned by the fault of either of the defenders;' but the Court altered, and adhered to the interlocutor pronounced by Lord Alloway.

*Defender's Authorities.*—M'Harg, 1770, (18965); Grant, January 1. 1791, (Bell's Cases, 319); M'Lean, Nov. 15. 1805, (Ap. No. 2 Repar.)

CAMPBELL and MACDOWALL,—W. DRYSDALE, W. S.—W. GUTHRIE,  
—Agents.

No. 404. *J. Tod and Others; Pursuers.—D. of F. Cranston—M'Neill.*  
*JAMES Tod and Others, Defendants.—Sol-Gen. Hope—*  
*Forsyth.*

*Burgh Royal—Election of Magistrates.*—An action of reduction of certain proceedings at the election of magistrates by virtue of a royal warrant, raised more than two months thereafter, dismissed as incompetent.

June 2. 1826.

1st DIVISION.  
 Lord Medwyn.

D.

THE election of magistrates and councillors made at Michaelmas 1823 for the burgh of Pittenweem having been set aside, and the burgh thereby disfranchised, James Tod and others, at whose instance this had been done, were appointed interim managers. The former magistrates consisted of John Tod and others; and both parties presented petitions to the King for a royal warrant, which was obtained on July 19, 1825. It was not addressed to any particular person, but was delivered to James Tod and the other managers, and ordered that 'the persons who composed the magistrates and town-council of the said burgh on the day preceding the 16th of September 1823, or the majority of such of them as shall attend, do meet and assemble within the town-house of the said burgh of Pittenweem, upon the 13th day of September next, at twelve o'clock noon, and, when so assembled, do proceed to choose and elect the usual number of persons to be councillors of the said burgh; which councillors so chosen shall be empowered forthwith to proceed to the choice of magistrates and office-bearers, according to the set of the burgh.' James Tod and the other managers then issued a precept in terms of it. A meeting was accordingly held, on the day appointed, of those who had formerly been councillors, or alleged they had been so; at which a violent dispute took place as to the election between James Tod and his party, and John Tod and his adherents. James Tod took possession of the chair, and by rejecting the vote of the Lord Advocate, who belonged to the other party, he and his friends elected themselves magistrates. Of the proceedings at this meeting, an action of reduction was brought by John Tod and others; but it was dismissed, in consequence of an objection to the execution of the summons. They then brought a new summons, which was dated and signeted on the 21st of December, being more than two months from the day of election. In defence against this action it was contended, that this must be regarded as an annual election of magistrates, and that being so, it could only be competently challenged, in terms of the election statutes, within two months from the date of election, and in the

form of a petition and complaint. To this it was answered, that the action did not relate to the proceedings at an annual election of magistrates, but was directed against injurious acts done by the defenders, under colour of, but in disobedience to the royal warrant; and that even if it were to be regarded as an annual election, it was quite competent to complain of it in the form of reduction, and to obtain redress at common law. The Court, on the report of the Lord Ordinary, sustained the objection, and dismissed the action.

*Defenders' Authorities.*—Wight, 320; Bell, 493; Henderson, July 2. 1821, (ante, Vol. I. No. 125); Wight, 340, 258.

W. COOK, W. S.—MARTIN and STEVENSON, W. S.—Agents.

W. SMITH and Others, Pursuers.—*Dickson—Moncreiff—Pyper.* No. 405.

Miss LEITCH and Others, Defenders.—*Jeffrey—More.*

*Fee, Conditional or Absolute.*—A party having, by his deed of settlement, conveyed his lands to trustees, to hold them in trust for his widow's life-erent during her life and viduity; and, on her death or second marriage, for two substitutes successively, and their heirs and assignees in fee; whom failing, another substitute, but without calling his heirs or assigns; whom failing, other substitutes; and the two first substitutes having predeceased the widow, who never married a second time, and the third substitute having executed a general disposition, and also predeceased the widow—Held,—1.—That the fee had vested in him;—and,—2.—That the general disposition was effectual to evacuate the subsequent destinations.

THE late John Leitch, by deed of settlement, conveyed his lands of Kilmardinny to certain persons in trust, for the following uses and purposes:—‘That they may and shall hold the foresaid lands and others in trust for behoof of Elizabeth Ironside, my wife, in case of her surviving me, in life-erent, for her life-erent alimentary use alienarly, during the time of her life, and of her continuing my widow; and after her death, or in case of her entering into another marriage after my death, then for behoof of George Leitch, my brother, and his heirs and assignees, in fee: But in case he shall survive me, and shall be in life at the time of the death or second marriage of the said Elizabeth Ironside, then I appoint the said trustees to hold the foresaid lands and others in trust for behoof of James Frisby Leitch, my nephew, and his heirs or assigns, whomsoever, in fee, in case he shall be in life at the time of the death or second marriage of the said Elizabeth Ironside; and failing the said James Frisby Leitch, by decease before me, or prior to the death or second

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‘ marriage of the said Elizabeth Ironside, then I appoint the said  
 ‘ trustees to hold the foresaid lands and others in trust for be-  
 ‘ hoof of Andrew Leitch, my nephew, son of the said George  
 ‘ Leitch; whom failing, for behoof of my sisters Christian and  
 ‘ Mary Leitch, and my nieces Agnes and Jean Trokes, equally  
 ‘ among them, and their heirs and assignees: And I appoint my  
 ‘ said trustees, immediately after the death or second marriage of  
 ‘ the said Elizabeth Ironside, to grant, execute, and deliver a  
 ‘ valid, ample, and formal disposition of the said lands and others  
 ‘ in favour of the said George Leitch, and his heirs or assigns  
 ‘ whomsoever, in case he should survive me, and should be living  
 ‘ at the death or second marriage of said Elizabeth Ironside:  
 ‘ But in case of the said George Leitch predeceasing me, or in  
 ‘ case of his death previous to the death or second marriage of  
 ‘ the said Elizabeth Ironside, then I appoint the said trustees to  
 ‘ grant, execute, and deliver a valid, ample, and formal disposi-  
 ‘ tion of the said lands and others in favour of the said James  
 ‘ Frisby Leitch, and his heirs and assignees whomsoever, in case  
 ‘ he shall survive me, and be living at the time of the death or  
 ‘ second marriage of the said Elizabeth Ironside: But in case of  
 ‘ the death of the said James F. Leitch before me, or before the  
 ‘ death or second marriage of the said Elizabeth Ironside, then  
 ‘ I appoint the said trustees to dispose the said lands to and in  
 ‘ favour of the said Andrew Leitch, my nephew; whom failing,  
 ‘ to my sisters Christian and Mary Leitch, and my nieces Agnes  
 ‘ and Jean Trokes, equally among them, their respective heirs  
 ‘ and assigns.’

George and James Frisby Leitch survived the truster, but predeceased the widow, who never married a second time. Subsequently to the death of George and James, Andrew executed a trust-disposition in favour of Smith and others, as trustees for his creditors, conveying to them generally ‘ all and sundry lands, heritages, houses, tenements, and other hereditaments, heritable bonds, adjudications, and sums therein contained, and in general all other real or heritable subjects whatsoever which shall be pertaining and belonging to me at the time of my death.’

Shortly after executing this deed, Andrew Leitch died; and he also predeceased the widow, who survived till 1823. On her death, the trustees of John Leitch raised a multiplepinding, to have it determined in whose favour they were to denude of the lands of Kilmardinny. In this process, claims were lodged on the part of the trustees of Andrew Leitch, and on the part of Mrs. Christian Leitch, &c., the substitutes called on the failure of Andrew. For the former it was contended,

that although survivance at the death or second marriage of the trustor's widow was made a condition of George and James Frisby, Leitch's succession, this condition was not adjected to the substitution in favour of Andrew; and therefore, as the fee must have existed somewhere, that the trustees holding for behoof of the widow, for her liferent use only, must have held the fee for behoof of Andrew, who was called unconditionally on the death of the two previous substitutes; and accordingly that Andrew, being vested with the right of fee at the date of his disposition in favour of the claimants, his right to insist on the trustees of John Leitch denuding in his favour had been transmitted to them by this general conveyance. On the other hand, it was contended for Mrs. Christian Leitch, &c.—1. That, by the conception of the trust-deed, the trustees were not to begin to hold the property for any of the substitutes till after the death or second marriage of the widow, and that the fee therefore could not vest in any of them till that event; that the condition of the substitutes surviving either of these events was applicable to all the substitutes, and suspended the vesting of the fee in any of them; and as there was no destination to Andrew's assignees or heirs, he was not vested so as to transmit any right by his general disposition;—and, 2. That, supposing the right of fee had vested in him, the general conveyance founded on by the trustees was not sufficient to carry it, and evacuate the substitution in John Leitch's trust-deed. The Lord Ordinary preferred Mrs. Christian Leitch, &c.; but the Court, after ordering Cases, by a majority altered, and preferred Andrew Leitch's trustees.

The LORD ORDINARY in a note, after narrating the several clauses of the deed, observed—‘ From this it appears that John Leitch's  
 ‘ primary object was to give his widow a liferent of the lands;  
 ‘ and the gift of the fee of the subject was of course only after  
 ‘ her death, or ceasing to be his widow by becoming the wife  
 ‘ of another man. This must control the remaining parts of the  
 ‘ deed, so as that the fee could not open to any one till after her  
 ‘ death and second marriage.’ And his Lordship further added—  
 ‘ It is quite clear that the denudation was not to take place till  
 ‘ after the death or second marriage of Elizabeth Ironside (the  
 ‘ widow); and as the trustees were to hold it for behoof of her in  
 ‘ liferent, and were called on to denude in favour of Andrew  
 ‘ Leitch, without mention of his heirs and assignees, such denuda-  
 ‘ tion could be demanded for himself only, and not by his heirs or  
 ‘ assignees after his death, before that of Elizabeth Ironside. As,  
 ‘ therefore, he died before her, the Lord Ordinary thinks that the

' general disposition by him, even if it had specially mentioned this subject, would not have been effectual. But further, the trust-disposition founded on by Andrew's trustees does not bear the most distant allusion to this subject. It only disposes all and sundry teinds, heritages, &c., and in general all other real or heritable subjects whatsoever, which shall be pertaining and belonging to me at the time of my death. The subject in question did not pertain to him at the time of his death. It was also under a destination to others failing him; and it appears to the Lord Ordinary, that under the rules governing general dispositions, it would have been necessary for him specially to mention the subject, in order to evacuate the destination in John Leitch's settlement. See the case of the Duke of Hamilton and the Honourable Mrs. Westenra, then Miss Hamilton, relative to the teinds of the parish of Cambusnethan, precisely in point. These teinds were designated to heirs-male; and although they were held in fee-simple by the Duke, and teinds were conveyed in general by a general disposition, the general conveyance was not held to evacuate the substitution to heirs-male.'

**LORD GLENLEE.**—I think the interlocutor is right. The trustees were to hold the beneficial interest during the life of Mrs. Leitch or her continuing a widow, and 'then' on her death or second marriage, but not till then, they were to hold it for other parties. It is said a fee cannot be in pendente;—that is true; but the beneficial interest may; and the beneficial interest here is suspended till the death of the widow, or her second marriage. The cases quoted for Andrew Leitch's trustees do not apply. In the report of that of Selkirk and M'Dowall, we see only the denuding clause, and it may have been the fact that Crawford, to whom the fee was destined, had a vested right; but the widow who then had the liferent was dead, and Crawford alive when the competition arose, which was between a private assignation and a sequestration, both prior to the widow's death, and no attempt was made after that event to obtain a second or supplemental sequestration, the special adjudication led by the trustee being only to make up a feudal title. The question then came to be, whether an assignation or adjudication was the proper way to transfer? All the other cases quoted were trusts of the ordinary kind. The nature of this trust, however, was to create an eventual fee, to begin to exist after the liferent ceased. It is only the introduction of the intermediate clauses of substitution of George and James, which has a tendency to make us forget that nothing is to be done—that the trustees are not to begin to hold for any of the substitutes till after the widow's death or second marriage; and by leaving out these in reading the deed till it comes to Andrew, it is at once seen to be the meaning that there

was to be no constitution of the fee at all till the arrival of either of these events.

LORD PRINCEPATON at first gave an opinion similar to the above, but when the Case came to be advised, his Lordship observed :—I was formerly inclined to concur with the interlocutor, but I have now come to entertain a different opinion. All that was given to the widow was a life-ferent interest ; she had no claim beyond that. It is equally clear that the trust-deed created a fee in the relations of the trustee called to the succession ; and although it could not be exercised till the life-ferent ceased, still it was a co-existing estate. There were two separate and independent estates of fee and life-ferent, and the fee must have existed in the person of some one or other during the existence of the life-ferent. It is said that the fee was vested in the trustees, and that the substitutes had only a contingent upon successions ; but this does not solve the difficulty. The trustees were no doubt feudally vested, but it was only in trust. They were no more fiars than life-ferenters ; and the fee from the beginning was in one or other of the persons named. It could not be otherwise. Then who was the person ? This depends on the words, ‘ and after her death, &c. then I appoint,’ &c. The purpose of this clause, however, is merely to declare that none of the fiars should exercise their rights till the death of the life-ferenter. It is merely a repetition of the widow’s right being only a life-ferent ; and this construction was put upon stronger words in the case of Wellwood, which, as well as that of M’Dowall and Selkrig, are of much importance here. Farther, I cannot get over the marked distinction between the provisions in favour of George and James and of Andrew. Are the words, ‘ in case he shall be in ‘life,’ &c. to go for nothing ? and is the omission of them in the case of Andrew not to make a difference ? I do think them very important, as showing that it was not a contingent fee which was conveyed in Andrew’s case, making it a fee for him, but not for the others, unless in the event of their surviving the widow.

LORD ROBERTSON was of the same opinion.

LORD ALLOWAY.—I consider this a question of great difficulty, but my opinion coincides with that delivered by Lord Pitmilley, and I subscribe entirely to the doctrine laid down in the Case for Smith, &c. The life-ferent and fee are quite separate estates ;—a life-ferent cannot exist without a fee ; and though the fee be fiduciary, it can make no difference, as it is still for behoof of the persons nominated by the truster. The supposed intention that the fee should not vest till the lady’s death is inconsistent with the terms of the deed, and the case of M’Dowall and Selkrig, which I cannot distinguish from this, for though Crawford survived the life-ferentrix, he had granted the assignation prior to her death. The omission, too, in regard

to Andrew, both in the dispositive and denuding clause of the express condition inserted as to the other two, presume the truster's intention to make a difference as to him; but that does not affect my mind, as, where words are so express, we cannot attend to presumption of intention, agreeably to the authority of Lord Stair and the cases of Tennant and Urrard. As to the other point, I shall say nothing, as it has not been touched on by the Judges who have preceded me.

**Lord Justice-Clerk.**—I still remain of opinion that this interlocutor should be adhered to. I concurred in the case of Urrard alluded to by my brother, and consistently with the judgment there, I do not wish to go at all out of the deed, or to found on presumption of the testator's will. But, in construing this or any other deed, we are bound to take the whole destinations, and compare one clause with another, so as to ascertain the meaning of the deed, but certainly without looking to other matters to determine what was the testator's will. Under this deed, then, the trustees were to be vested and inest in the lands of Kilmarinny, and were to hold them during the widow's life and widowhood for her use, and after her death these trustees were 'then' to hold them for behoof of George in case he should survive, and the same as to James. The deed next proceeds, 'then I appoint the said trustees to hold the foresaid lands, &c. for behoof of Andrew Leitch.' Now the words applied to George and James, 'in case he shall survive,' &c. are, no doubt left out here, and undoubtedly we are not to supply them. But it appears to me, that, upon grammatical and legal construction of the whole clause of destination, we must hold that it is not only the death of George and James which must be precedent to the trustees holding for behoof of Andrew, but that the death or marriage of the widow is also precedent to their doing so. The appointment to denude must be taken in connexion with the destination, and under it also nothing was to be done by the trustees till after the widow's death or marriage. None of the cases quoted appears to me to affect the construction of this instrument. In the report of that of M'Dowall and Selkrig we have no more than the denuding clause, and there was no second sequestration. In the case of Wellwood there was no doubt that the party had the fee, but it is not applicable; and, on the whole, I think that on the face of this deed, without going to any presumption, we have sufficient authority for saying, that the trustees were not to hold for Andrew Leitch till the death or second marriage of the widow.

None of the Judges made any observations as to the second point.

*Authorities for Smith, &c.*—(1.)—Baillie, June 17. 1766, (14941); Campbell, Nov. 28. 1770, (14049); Hay of Linplum, July 24. 1788, (2315); Murray, June 22. 1774, (14058); Dykes, June 3. 1813, (F. C.); Ball v. Coutts, March 6. 1806, (F. C.); Richardson v. Stewart of Urrard, July 5. 1821, (ante, Vol. I. No. 131);



Wellwood, Feb. 23. 1791, (15432).—(2).—Weir, Nov. 23. 1752, (4314); Robson, Feb. 18. 1794, (14058); Drummond, July 17. 1782, (2313); Gordon's Trustees, Dec. 4. 1821, (F. C.); Laing Weir, Dec. 6. 1831, (F. C.); M'Dowall and Selkrig, Feb. 6. 1824, (ante, Vol. II. No. 640.)

*Authorities for Miss Leitch, &c.*—(1).—Duncan, &c. June 27. 1809, (F. C.); O'May, Nov. 19. 1788, (6340); M'Culloch, Dec. 18. 1760, (6849); Sempill, Nov. 15. 1792, (8108); Henry, Feb. 19. 1824, (ante, Vol. II. No. 668).—(2).—Farquharson, March 2. 1756, (2290); Duke of Hamilton v. Mrs. Westerra or Miss Hamilton, (not reported); Duncan, &c. June 27. 1809, (F. C.)

J. LANG, W. S.—W. and A. G. ELLIS, W. S.—Agents.

Lady MARY LINDSAY CRAUFURD, Pursuer.—*Alison*.  
General DURHAM, Defender.—*Walker*.

No. 406.

*Prescription.*—Prescriptive possession of coal.

IN 1631 the coal of the lands of Radernie was conveyed, along with certain lands, &c. erected into a barony, to John Lord Lindsay, and had been continued in the several titles of the family down to those of the present pursuer. On the other hand, James Henderson, in virtue of a charter under the Great Seal, was, in 1730, infeft in the same lands of Radernie, along with the coal and other minerals; and, in a conveyance of the lands to his brother William, he specially reserved the right to the coal. James was succeeded by his nephew Sir Robert, who made up titles, and was infeft in this coal in 1765. Sir Robert was succeeded by his son Sir John, who never made up feudal titles to the coal, but sold it by missive of sale to the late Mr. Durham, and his son the defender, in 1782. In 1819, Lady Mary Lindsay Craufurd, as representing John Lord Lindsay, and founding on the right to the coal in her titles, raised an action of declarator against General Durham to have her right declared. In defence, he pleaded prescriptive possession following on the titles made up by James and Sir Robert Henderson. The Lord Ordinary having pronounced an interlocutor allowing a proof, Lady Mary reclaimed, on the ground that General Durham had made up no feudal title, but that his title rested solely on the missive of sale in 1782, granted by Sir John Henderson, who had not made up titles in his own person; and that, therefore, the alleged possession by General Durham and his father was not possession following on a sasine. The Court having appointed General Durham to condescend on the manner in which he proposed to make up a feudal title to the coal in question, he accordingly gave in a condescendence, stating that he could complete his title by means of a charge against Sir John Henderson's

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only daughter, followed by an adjudication in implement. Thereupon the Court remitted to the Lord Ordinary to sist process till a title should be made up, and when this was effected in the way proposed, his Lordship allowed the proof (which had been previously taken to lie in retentis) to be opened; and from this it appeared that neither Lady Mary nor her ancestors had ever worked the coal in question, but that, on the other hand, old witnesses, from about 75 to 84 years of age, deponed to the coal having been in use to be regularly worked within their recollection, which they carried back as far as 1758, by the Henderson family, under the management of one Paterson, and was continued also at a later period by one Nicolson, to whom the coal was let, as appeared by a receipt for rent dated 1769. It was likewise admitted, that after the sale in 1782, Mr. Durham had commenced working in 1784, and continued his operations till 1795; that a steam-engine, erected in 1783, was not removed till 1800; and that, subsequent to 1795, and down to 1810, he made several trials for coal, which were not prosecuted in consequence of the barrenness of the field, and that there had never been any attempt at interruption. On this proof the Lord Ordinary sustained the defences, and the Court unanimously adhered, refusing to delay the cause till the decision of the case of *Forbes v. Livingstone*, (remitted by the House of Lords,) which they considered to be totally different from this.

GEORGE LYON, W. S.—WALKER, RICHARDSON, and MELVILLE, W. S.  
—Agents.

No. 407.

G. HUNTER, Pursuer.—*Cockburn—More.*

Honourable B. COCHRANE, Defender.—*D. of F. Cranstoun—Forsyth—Moncreiff—Macquochie.*

*Personal Objection—Expenses.*—A party having opposed a valuation of lands at a particular period, agreeably to the terms of a mutual contract, till that period had passed, held not entitled afterwards to insist that the value should be calculated as at that period. Held also, that the expense of the answers to a petition being found due, included that of opposing the petition at the bar.

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HUNTER and the Honourable Mr. Cochrane purchased the estate of Auchterarder as a joint adventure, and the 8th article of their agreement provided that the whole should be wound up as at Whitsunday 1816, and that if any part of the estate was unsold, it should then be valued, and the accounts between the two parties settled. Differences having arisen between them, they both raised counter actions of accounting and damages. Mr.

Cochrane's summons contained a conclusion that the estate should be valued at Whitsunday 1816, and matters settled agreeably to the 8th article, but Hunter's contained no such conclusion; and he maintained, in opposition to Mr. Cochrane, that circumstances had now rendered the 8th article inapplicable. In this way he prolonged the litigation for some time, till, in 1819, the Court found that the 8th article must regulate the settlement between the parties, and that the estate 'must now be valued.' A remit was thereafter made by the Lord Ordinary to a valuator, who reported the value as at Martinmas 1819, and his report was approved of by an interlocutor allowed by both parties to become final. After some further procedure had taken place, and the mutual claims of damage had been repelled, (see ante, Vol. III. No. 79), Hunter objected to the valuation as not being made in 1816, in terms of the 8th article; to which it was answered, that it was owing entirely to his own opposition that this had not been done. The Lord Ordinary repelled the objection; and the Court, on a petition and answers, unanimously adhered, and awarded to Cochrane the expense of the answers, which, they held, included the expense of opposing the petition when moved.

W. DICKSON, W. S.—J. THOMSON, W. S.—Agents.

J. SCOTT, Pursuer.—*Jameson.*

R. CARNEGIE, Defender.—*G. Bell.*

No. 408.

*Citation.*—Circumstances in which an objection that a citation had not been given at the legal domicile, was repelled.

CARNEGIE obtained a lease of a house in Broughton street, Edinburgh, from the 10th of October 1823 to Whitsunday 1825; but, about the 5th of April of the last of these years, he ceased to occupy the house, disposed of his furniture, and dismissed his servants. In the month of May he went to reside with his brother at Lower in Forfarshire, having no other place of residence. On the 28th of that month, Scott executed a summons against him, by leaving a copy for him with a servant at Lower; and upon the 31st he also executed it against him, by leaving a copy at the house in Broughton street. It was admitted that he had received the copy which had been left for him at Lower, and that he sent it to his agent, to attend to his interest. In defence against this action he stated,—1. That as he had entirely left his residence in Broughton street forty days prior to the 31st of May, it was not then his legal domicile;—and, 2. That as he

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had not resided at Lower for forty days previous to the 26th of May, and was then only upon a visit to his brother, it could not be regarded as his dwelling-place. To this it was answered,—1. That as a citation had been left for him at the last dwelling-house which he occupied in his own name, within six days of the expiry of the lease of that house, he was legally cited, if he had not acquired any other domicile in Scotland;—and, 2. That if he had acquired such a domicile, Lower must be regarded as that domicile, and that accordingly he still continued to reside there. The Lord Ordinary repelled the defence, and the Court adhered.

*Defender's Authorities.*—1540, c. 75; Gordon, Sept. 30. 1702, (3702); Bruce, July 13. 1708, (3696); 1. Ersk. 2. 16.

J. WEMYSS,—J. SCOTT,—Agents.

No. 409.

C. MORISON, Suspender.—*Skene*.  
W. FORBES, Charger.—*Robertson*.

*Diligence—Imprisonment.*—1.—A debtor having been liberated under the Act of Grace, as the creditor had failed to lodge the aliment awarded—Held competent to reimprison him for the same debt eleven months afterwards without lodging the aliment, the creditor, however, consigning ten shillings in terms of the 6. Geo. IV. c. 62.—2.—Objections to the regularity of charge refused to be listened to in a suspension, the executions being correct.

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MORISON was imprisoned by Forbes in May 1825, on a charge for payment of a bill dated 22d July 1824; and having obtained an award of aliment under the Act of Grace, he was liberated in respect of its not having been lodged. In April he was again charged and incarcerated, (with a view, as was alleged, to make him bankrupt, so as to entitle his creditors to take out a sequestration against him,) and at the time of his delivery into the jail, Forbes, his incarcerating creditor, lodged ten shillings in the hands of the jailor, in terms of the late statute, 6. Geo. IV. c. 62. He then presented a bill of suspension and liberation, on the grounds,—1. That it was incompetent to re-imprison him for the same debt, without consigning the aliment which had been awarded him on his former imprisonment, and in default of the payment of which he had been liberated; and that the ten shillings lodged in terms of the 6. Geo. IV. c. 62, could not remove the necessity of such consignment, as, by the act, he was not entitled to receive this money till he should obtain a new award of aliment.—2. That the diligence was irregular, in so far as the execution of two charges had been returned, the one as on the 6th of April at his dwelling-house, and the other on the 7th personally, while

he alleged that no charge had been actually given on the 7th; and the copy left for him on the 6th charged him to pay a bill dated 22d July 'last,' being July 1825, whereas the bill was dated in 1824, and, before the advising in Court, he raised a summons of reduction of these two executions;—and, 3. He alleged that there was some appearance of vitiation on the denunciation, which denounced him for disobeying 'charges' generally, whereas he contended that the denunciation ought to have been for disobeying the second charge alone,—it being the universal practice of messengers in giving a second charge to state that the first was departed from, which was not done here. Forbes, besides combating these pleas, objected to the competency of the bill of suspension, that it bore to be signed by one agent for another, while the latter had disclaimed, by a letter produced, having given any such authority; and that the means by which this defect was attempted to be cured were inept, viz. having the bill indorsed by an authorized agent several days after it was presented. The Lord Ordinary refused the bill, 'in respect, 1. That 'this bill is subscribed by Mr. T. Innes for Mr. S. F. M'Intosh, 'who gave no authority for such subscribing, and who renounces 'any concern with the bill; 2. That the allegations that the execution of denunciation of the horning has been vitiated are false, 'and proved to be so by an extract from the records of hornings; 'and lastly, That when the complainer was incarcerated, consignation was made in the hands of the jailor of money to be applied to the aliment of the prisoner when he should demand it;' and the Court unanimously refused a reclaiming note.

The LORD ORDINARY observed in a note, 'That, in the abstract, the 'Court will hold, that a man who has been once liberated from jail 'under the Act of Grace cannot be again imprisoned on the same 'caption. The Lord Ordinary cannot conceive that if the debtor, *being a bankrupt* after liberation, succeed to a large fortune, he may not again 'be imprisoned in virtue of the caption, which is in all its original force.'

**LORD ALLOWAY.**—The only important question is the re-imprisonment, as to which the law was at one time contradictory; but later judgments go to support the Lord Ordinary's view. As to the objections to the executions, whether they may enable him to reduce them is another question; but we cannot allow the mere raising a summons to suspend diligence.

**LORD JUSTICE-CLERK.**—I cannot disturb the interlocutor. The consignation in terms of the statute appears to me sufficient, the more especially as so many months elapsed between the liberation and second imprisonment; and as to the other matters, they are not

sufficient to justify an interference by the suspension of the diligence.

The other Judges concurred.

W. WILLIAMSON,—R. BURNS, W. S.—Agents.

No. 410.

Mrs. GRAHAME, Pursuer.—*Skene*.

J. GRAHAME, Defender.—*Sol.-Gen. Hope*.

*Aliment—Jurisdiction—Husband and Wife*.—The Court dismissed, as incompetent before this Court, an action of aliment at the instance of a wife against her husband, but awarded an interim sum to preserve her from starvation.

June 3, 1826.

2d Division.

THE Court refused to entertain an action of aliment by a wife against her husband, (although the latter was willing to waive the objection to the competency,) reserving her to apply to the Commissary Court; but at the same time, as she was stated to be in circumstances of extreme destitution, their Lordships awarded an interim sum of £30, leviable out of the funds of a landed estate to which she had right.

R. BURNETT, W. S.—J. BROWN,—Agents.

No. 411. P. THOMSON and Others, Pursuers.—*Jeffrey—More—Neaves*.

W. BISSET and Others, Defenders.—*Moucreiff—Jameson—Christison*.

*Insurance*.—A master of a vessel being in pilot's fareway and difficult navigation, but where no licensed or branch pilot was to be had, bound to take the best assistance of persons locally acquainted with the navigation which he could procure, and his having neglected to do so held to liberate the underwriters.

June 3, 1826.

2d Division.

Admiralty.

B.

THOMSON and others, owners of the brigantine *Aid*, raised an action against Bisset and others for recovery, as under a total loss, of the amount underwritten by them on a policy of insurance on the vessel, which had been wrecked at Scalpa in the Hebrides. The Judge Admiral remitted certain issues to the Jury Court, where a verdict was obtained for the pursuers; but a motion having been made for a new trial, the parties agreed that this verdict should be departed from, and a general verdict entered for the pursuers, subject to the opinion of the Court, on a Case and certain points of law. The facts, as stated in the Case, (in so far as touching the only point decided by the Court,) were as follows: The policy underwritten by the defenders was on the hull and materials of the *Aid of Dundee*, at and from Riga to Londonderry. The vessel sailed from Riga with a cargo of flax-

seed; and in the course of her voyage from thence to Londonderry she was, on the 15th of October 1819, driven by stress of weather to Scalpa in the Hebrides, which is in pilot's fareway, and is a place of difficult navigation, there being dangerous ground which can only be seen at low water, and rocks, not visible except at very low tides. There are two entrances to the anchorage in the harbour,—one called the west, and the other the north passage; the former of which is the most difficult, owing to sunken rocks. There are no licensed or branch pilots at Scalpa, or nearer than Stornoway, a distance of 24 Scotch miles; but the keeper of the lighthouse, distant about two or three miles from the harbour, and not within sight of a signal made at the anchorage, and the assistant keeper, who had been a seaman, are in use to give assistance, when required, in taking vessels in or out of the harbour. There are also fishermen and other persons residing near the harbour, (a few of whom only can speak English,) who are in the practice of conducting vessels into or out of the harbour; but these latter are not capable of managing or steering a vessel. They, however, point out to seamen the course to be taken, and the dangers attending the passage; and masters who are strangers to the harbour are in the practice of taking the assistance of one of the lighthouse-keepers, or one of the fishermen, though vessels sometimes enter and leave it without such assistance. These persons are under no obligation to give their assistance, but are remunerated if they do. The *Aid* entered the harbour by the north passage, being conducted by the assistant lighthouse-keeper, who pointed out to the master all the dangers. He brought her safely to an anchorage at one o'clock P. M., within three hours of full tide; and he deposed that, in his opinion, he gave the master sufficient information to enable him to go out without further assistance. This person was entered in the log-book as a pilot, and received remuneration for his trouble, although he made no charge. Next morning an attempt was made to navigate the vessel out of the harbour by the west passage, without having the lighthouse-keeper, his assistant, or any other person on board to point out the passage. It was high water 26 minutes past four o'clock; and at six o'clock, the wind being fair, the sails were set, and the weighing of the anchor was proceeded with, for the purpose of going out by the west passage. About seven o'clock, however, the anchor having dragged, the vessel struck on a rock near the common roadstead, shelving downwards with a tail, which at the time was entirely covered with water, though sufficiently visible through it, and which had been seen

when the vessel came to an anchor the preceding evening. The vessel stuck fast on the rock till the tide ebbed, when she fell off, and was thereby so much damaged, that in two hours after her fall she went to the bottom; whereupon the owners immediately abandoned the vessel as on a total loss. The master and assistant-master of the Trinity-house of Leith, and several other practical seamen, gave evidence, that in their opinion it was the duty of the master to have taken the assistance of one of the lighthouse-keepers, or of one of the fishermen, if no better assistance could be had,—while other practical seamen deponed that this would depend on the master's acquaintance with the place, or on his skill as a seaman, and the goodness of his charts. The question of law reserved for the opinion of the Court in the Case (besides certain points as to whether the loss was to be considered as total or only average, not decided by the Court,) was, 'whether, being in 'pilot's fareway, but where no licensed or branch pilot could be 'had, except at the distance of 24 Scotch miles, the master was 'bound, under all the matter stated in this Case, to have taken 'the assistance of a local pilot, or such assistance as could be 'had?' and if so, judgment to go for the defenders. For Thomson &c., the owners, it was pleaded,—1. That it was no part of the duty of a master to take a pilot on board, unless he could obtain a professed pilot, having a privilege, if not from the Trinity-house of London or Leith, at least from some authorized corporate body, to whom he could commit the complete and total management,—a pilot necessarily superseding (as they contended) the master in the management of his ship;—and, 2. That the master had taken every precaution necessary in obtaining from the assistant lighthouse-keeper such information as, in the assistant's opinion, was sufficient to enable him to leave the harbour, the more especially as the accident was of such a nature, that it could not have been prevented by the assistance of a pilot. On the other hand, it was contended for the underwriters, that it was part of the implied obligation of warranty, that the master should, in cases of dangerous navigation, avail himself of the best assistance he could procure, although there should be no licensed branch or other authorized pilot to be had, particularly as in Scotland the privilege of the Trinity-house pilots was confined to the frith of Forth, and as the pilotage acts did not extend to this country; and that the master having failed to fulfil this warranty, the owners could not recover. The Judge Admiral found, 'That the master was not bound, under all the matter stated in 'the case, to have taken the assistance of a local pilot, or such 'assistance as could be had,' and decerned against the under-



writers as for a total loss; 'but, in respect of the difficulty and 'nicety of the case,' found no expenses due to either party. Of this judgment both parties brought reductions,—the underwriters as to the merits, and the owners so far as they were not found entitled to their expenses; and the Court found, 'That the master of the brigantine Aid was bound, under the circumstances 'of the case, to have taken on board a pilot, or such other skilful 'person as is accustomed to act in that capacity at Scalpa, or in 'the neighbourhood thereof; and as this finding is decisive of 'the cause, find it unnecessary to determine the other points 'brought under consideration by the parties;' and accordingly they reduced and decerned in terms of the action at the instance of the underwriters—thus assoilzieing them from the conclusions of the original libel; and in the reduction at the instance of the owners (relative to expenses) their Lordships assoilzied, and they further found that neither party was entitled to expenses in this Court.

**LORD GLENLEE.**—There are certain places, as in the Thames, where public pilots are provided, and where the taking a pilot on board is a matter of solemnity; so that a vessel without a licensed pilot is held, in a question with underwriters, to be versans in illicito, in the same way as if she had deviated from her stipulated voyage. But, as to other places, the master is only obliged to do what is right and expedient in conducting the ship; and therefore he should take such assistance as the place affords to point out the shoals and rocks, though there should be no licensed or branch pilots. Here, however, the facts stated in the Case show that the master did perform this duty; for I do not think we must take it as if the information obtained by him from the assistant lighthouse-keeper was only such as would enable him to go out by the way he came in; on the contrary, we must hold that he pointed out all the rocks and shoals, whichever way he might go out. The master was therefore fully informed in a situation where there was no absolute necessity to take a pilot as a matter of solemnity. The rock too was well seen, and the master was aware of it; but she struck before she got into such motion as that the helm had proper power, so that any occasional puff of wind might have thrown her on the rock, which was near her place of anchorage. On this point, therefore, I think the Admiral's judgment is right.

**LORD PITMILLY.**—I entertain great doubts of this judgment. It is clear that the master acted improperly in endeavouring to get out of this most dangerous harbour, beset with innumerable rocks, as we see from the charts, and as appears from the Case, without all the assistance he could procure, and especially after the tide had

been retiring for two hours and a half. It is said that the lighthouse-keeper was not bound to give his assistance, and that the fishermen spoke Gaelic. This, however, is not an excuse for his not attempting to procure his assistance. He might have made an appointment with him the day before. But he did not attempt to get him or any of the fishermen,—contenting himself with asking him the night before to point out the rocks from a distance, as it must have been. I therefore cannot doubt but that the master acted improperly; and my opinion is confirmed by what is stated by the master and assistant of the Trinity-house of Leith. As to the opinion of the other practical seamen, we have no evidence of the master's skill, or the goodness of his charts, on which it depends. The warranty that the vessel shall be properly manned, implies that the master shall have a person of skill to navigate in difficult cases; and the question then is, Is he absolved, because there happens to be no regular branch pilot within 24 miles? I cannot hold that the obligation lies only where there are regular pilots. In the absence of these, the law requires the master to take the best assistance to be had. The acts of Parliament as to pilots do not apply to Scotland, and we are left to the regulation of the common law. But, even in England, it appears from the case of *Law against Hollingsworth*, that where there is no branch pilot, the best person to be had must be taken. My only doubt here arises from the opinion of the lighthouse-keeper that further assistance was unnecessary; and from this, that the rock was seen near the place of anchorage, and had been seen the preceding evening. We are bound to hold that it was pointed out by the lighthouse-keeper, and this narrows the case very much; but, though with some doubt, I am still of opinion that the master was bound to have asked for assistance, and that his pleas do not excuse him.

**LORD ALLOWAY.**—This is a case of extreme difficulty and importance, and I have considered it with much anxiety; but my opinion coincides with that expressed by Lord Glenlee. According to the decisions of this Court, as well as of the Courts of England, where any causes prevent the master of a vessel getting a regular pilot in pilot's fareway, he is only bound to act *bonâ fide*; and if he does so, the underwriters remain bound. The result of the cases is, that in places where it is not a point of statutory regulation, it is a matter of *bona fides* and discretion, to be judged of by the particular circumstances of the case. Here the vessel was driven to *Scalpa* by stress of weather, and the master got the assistant lighthouse-keeper to pilot her into the anchorage, who declares that he gave the master such information as would have enabled him to get out without further assistance; and if he is to be called a pilot at all, how can it be said that the master should have asked his assistance when he himself deemed it quite unnecessary? Further,

I hold it to be a maxim, that if a master takes a pilot on board, and does not follow implicitly his directions, he becomes responsible for any loss; and how, then, could he subject himself to this responsibility by taking a Gaelic fisherman on board? The loss, too, happened by an accident which no pilot could have prevented; and, on the whole, I think there are no grounds for relieving the underwriters.

**LORD JUSTICE-CLERK.**—I entertain a different opinion. We must take the facts as they appear on the face of the Case, and must set out with this, that Scalpa is in pilot's fareway,—is a place of dangerous navigation,—and that the west passage is the most difficult, owing to sunken rocks. As to the question of law, I am clearly of opinion, in the first place, that the doctrine of the law of pilotage, being confined to licensed or branch pilots, is inapplicable here. The statutes do not extend to Scotland; and it would be very dangerous to say, that, in places at a distance from a regular pilot, the master is not to take any other assistance. It is founded on reason and the principles of insurance law, that the master is bound to have recourse to the best assistance which is to be had in the circumstances of the case; and here, in going in, the master did obtain such assistance. We have no sufficient evidence that the assistant lighthouse-keeper pointed out all the dangers of any other passage than that by which the vessel entered; but I will take it that he did give information relative to both passages. Still it was a very questionable proceeding to endeavour to go out, two hours and a half after high water, without the assistance of the same man,—or, if that could not be procured, of one of the fishermen, who are admitted to be in use, as well as the lighthouse-keepers, to pilot vessels in and out of the harbour. Even if he had attempted to go out by the north passage without assistance, I could not have held the case clear in his favour; but I am satisfied that he was not justified in so attempting to go out by an entirely different passage. It is said the pilot could not have prevented the dragging of the anchor. I admit this; but the pilot might not have advised sailing at that period of the tide. The opinions of the persons from the Trinity-house deserve great weight; and as to the qualification adjected to the opinion of the other seamen, we have no evidence as to how the facts to which they allude stood in the present case.

**LORD ROBERTSON.**—I think the insurers are not liable; for although the master could not have the benefit of a licensed pilot, as there are only fifteen in all Scotland, and most of them in the frith of Forth, and although a licensed pilot is to be preferred, still it does not follow, because the best possible assistance is not to be obtained, that in a difficult navigation the master is not to take the best assistance which he can get. The master here was to blame in not

availing himself of such assistance. I do not go so far as to say that he is to give up the conduct of the vessel to a person who is not a licensed pilot; but it is still the master's duty to avail himself of his assistance, and on this point I attach much weight to the opinion of the master and assistants of the Trinity-house of Leith.

*Pursuers' Authorities.*—Abbott, 181. (2d edit.); 1. Holt, 6. (6th edit.); 1. Bell, 462; Marshall, 165; Attorney Gen. v. Case, &c. (3. Price's Excheq. Rep. 310); Pillans and Co. Nov. 12. 1808, (F. C.)

*Defenders' Authorities.*—1. Holt, 470; 1. Marshall, 159; 1. Park, 347; Law v. Hollingsworth, 7. T. R. 100; The William, Dec. 17. 1806, (6. Robertson's Adm. Rep. 816.)

RAMSAY and IMBIE,—RITCHIE and MILLER,—Agents.

No. 412.

P. FARQUHARSON, Pursuer.—*Fullerton—Kear.*

WM. HUTCHISON, Defender.—*Jeffrey—Neaves.*

*Cautioner.*—A party having agreed to see a debt due by another paid, provided diligence were not done till a certain day, and such delay having been granted, independent of, and without reference to that letter, and thereafter delays and indulgences having been granted for three weeks to the debtor, without the consent of the party so interposing, held that he was not liable.

June 6. 1826.

1st Division.  
Lords Alloway  
and Eldin.

H.

CHARLES HUTCHISON, the brother of the defender, was a tenant on the estate of Invercauld, on which the pursuer was a trustee. On the 23d of January 1823, Hutchison granted Mr. Roy, the factor on the estate, a promissory note for £440, being for the rent due at Whitsunday 1822, signed by himself, and also apparently by the defender. This note was payable at Whitsunday 1823, and was indorsed by Roy to the pursuer. The pursuer having applied to the defender for payment of the note, as his brother had allowed it to be dishonoured, he returned an answer by a letter of the 2d of July, in which he stated that for four years he had had no communication with his brother, and that his name must have been forged. He added, that 'having already made great advances for him, I will not at present become responsible for the payment of this debt, be the consequences what they may; but would beg leave not only to suggest, but earnestly to request, that you will instantly proceed against him, when I have not the least doubt you will recover payment. I stand his chief, if not almost his only creditor, having security on his lands for advances to the amount of £7000, which is nearly about their value; and I shall certainly agree

‘to postpone all proceedings on my part till the debt in your document be discharged.’—‘Should your client not be disposed to follow the course I have suggested, but to direct his claim against me, I must just resist it on grounds that must prove successful; at same time I have not the least doubt, if you follow the course I have pointed out, that you will recover payment.’ He then mentioned that he was obliged to go to Edinburgh; but would return to Forfar, his place of residence, on Wednesday the 9th. On his road to Edinburgh, he had a meeting with his brother at Perth, who showed him documents instructing that he was possessed of accessible funds in London to the extent of £1500, and on the 3d of July the defender wrote to the pursuer in these terms:—‘Immediately after writing you from Forfar yesterday, I came here to wait on my brother regarding the bill; and from the inquiries I have made, I have the satisfaction to say, that he will be in readiness in the course of a few days to pay it. He says he has written Mr. Roy to meet him at Kirkstyle of Kinloch on Tuesday first, (being the 8th,) when he will settle with him. Please delay proceedings till then, and I shall assist in getting the debt discharged, if not settled when I return from Edinburgh.’ This letter was not received by the pursuer till the 6th, and in the mean while he had written to his agent at Perth forthwith to raise and execute diligence against Charles Hutchison, but not to execute it against the defender; and accordingly a horning was instantly sent for. On receiving the defender’s letter, the pursuer immediately communicated its contents to Mr. Roy, but, before it reached him, Mr. Roy had had a meeting on Monday the 7th with Charles Hutchison; and in answer to the pursuer’s letter he said, he trusted that ‘matters still will turn out better than to appearances we might expect. He showed us the correspondence with his London agents, where there can be no doubt he has funds to meet us, but which, owing to the state of his grain, did not meet so ready a market. It was, however, settled that nothing would prevent Mr. Condie (the agent of the pursuer) proceeding with diligence as fast as the law would allow, except money was produced.’ This arrangement was not influenced by the letter from the defender to the pursuer, of which the parties present at the interview were ignorant. The horning against Charles Hutchison was obtained on the 9th, on which day the defender returned from Edinburgh; but no further proceedings were adopted against Charles, and on the 31st Mr. Roy wrote to him, that ‘I find it is now to no purpose listening to any promises which you make, as all are to the same purpose, only made to be broken.’

‘ I have now been expecting you here day after day, according to what you so earnestly promised when last in Perth ; and although you have gone on in such an extraordinary manner, I do not incline yet to proceed to extremities, without putting you on your guard. I therefore write to say, that by this post Mr. Condie is instructed to proceed with his diligence, and on no account whatever to be put off for a single day, unless money is produced.’ Immediately thereafter Charles Hutchison absconded, carrying off all the funds of which he was possessed. An action was then brought against the defender, founded on the letters of the 2d and 3d of July, and stating, that ‘ in consequence of this assurance and request and obligation come under by the said William Hutchison, defender, the pursuer granted the delay requested ; but, in place of the promised payment, the said Charles Hutchison, the defender’s brother, in the mean time collected his funds together, and absconded ;’ and therefore concluded for payment of the debt. In defence it was maintained,—1. That the letters, and particularly that of the 3d, did not contain an absolute obligation to pay the debt, but merely an offer to the defender to pledge his personal credit, on condition that a delay were given in the execution of diligence against Charles till Tuesday the 8th, by which time he had held forth assurances that he would pay the debt ; that, however, no delay had been granted in consequence of the defender’s letter, because, before the contents of it were known, the full period of delay had been granted to his brother, and therefore no obligation had ever existed against the defender ;—and, 2. That supposing such an obligation had existed, it was discharged by no notice having been sent to the defender of the result of the meeting, or of delay having been given in consequence of his letter ; and that, besides, it was the duty of the pursuer, immediately after the lapse of the period therein specified, to have executed diligence against Charles Hutchison, whereas no steps were taken for more than three weeks, and he was thus enabled to escape with his funds. To this it was answered,—1. That the letters of the defender formed an effectual and absolute obligation ;—and, 2. That a creditor does not lose recourse against a cautioner merely by not doing diligence ; and therefore the defence on that ground was unfounded. Lord Alloway found, ‘ that the defender’s letter of the 3d of July, founded upon as containing an obligation sufficient to subject him to the payment of this bill, could not operate beyond the meeting which was to take place at Kirkcaldy between Mr. Roy and Charles Hutchison, unless notice was given to the defender, and the additional delays had been given with his con-

'currence and consent; that it was sufficiently instructed by Mr. Roy's letter of the 31st of July, that nearly three weeks after the time appointed for the meeting at Kirkstyle delays and indulgences had been given; therefore that the letter of the 3d of July, founded on by the pursuer, is not sufficient to support the conclusions of the libel;' and assoilzied the defender therefrom. Lord Eldin refused a representation, and the Court adhered.

*Pursuer's Authorities.*—Hume, June 16. 1661, (3072); Mackenzie, Jan. 4. 1788, (6550); 1 Bell, 8. 4. Note; Rankine, May 15. 1812, (F. C.); 3 Ersk. 2. 66; Mansfield, June 9. 1749, (8225); Hamilton, June 13. 1766, (8227); Ewing, June 2. 1808, (F. C.)

*Defender's Authorities.*—Earl of Dundonald, Nov. 30. 1731, (8222); Fall, 160.

TED and ROMANES, W. S.—T. DRUCHAR—Agents.

Mrs. MARY MILNE OF SMYTH, and Husband.—*Jeffrey—Robinson.*

No. 413.

JOHN MILNE and Others.—*Skene—Pyper.*

Competing.

*Faculty.*—Circumstances in which a testamentary executrix, with a power of distribution, was held to have exercised that power by her latter will, in which she disposed of all the property as her own, and did not in any way allude to the power.

THE late James Milne, by his latter will, considering that he had made an adequate provision for his eldest son, and made great advances to purchase rank in the army for his other son Alexander, appointed his wife, Mrs. Isobel Milne, to be 'his sole executrix and universal intromittrix' with all his effects, giving her full power to uplift, discharge, &c., and 'to do every thing in the premises competent to an executor or executrix; but with the burden always of payment of my just and lawful debts and funeral expenses, and with the burden also of paying the hail provisions or legacies herein after mentioned.' He then specified certain legacies, chiefly to his daughters, and added—'Moreover, should a favourable opportunity occur for getting my son Alexander further advanced in the army, I would and do hereby recommend to my said spouse to give him what assistance lies in her power to purchase up. Lastly, I hereby declare, that in case the said Isobel Milne, my spouse, should again marry, she shall thereupon forfeit her right and title as executrix, and that office shall fall and devolve on the said

June 6. 1826.  
2d Division.  
Lord Cringletie.  
M'E.

' John Milne,—and failing him by death, the said Alexander  
 ' Milne, who shall have right to call her and her husband to an  
 ' immediate account for her intromissions in virtue hereof, and  
 ' out of the gross amount she shall only be entitled to retain £50  
 ' sterling annually from my death, to which sum she shall also  
 ' be restricted during her lifetime : But in case she do not again  
 ' marry, she is to be entitled to dispose of the residue of my for-  
 ' tune amongst our children after her death, in such proportions  
 ' as she thinks proper ;—hereby recommending her, when making  
 ' such settlement, to be impartial, and to study conscientiously  
 ' their circumstances and situation in life at the time, always  
 ' paying particular attention to the most necessitous, and those  
 ' who have been most dutiful and affectionate to herself.' Mr.  
 Milne died in 1807, leaving two daughters, besides his sons al-  
 ready mentioned. His widow was immediately confirmed execu-  
 trix ; she gave up inventories, and uplifted and discharged debts,  
 which she re-invested in her own name. It did not appear that  
 she possessed any property of her own ; and in 1822, never hav-  
 ing entered into a second marriage, she executed a latter will,  
 which set forth, that ' I being desirous of settling my worldly  
 ' affairs during my own lifetime, so as to prevent all disputes  
 ' and differences that might otherwise arise thereamong after my  
 ' death, do hereby nominate and appoint John Smith, &c. to be  
 ' my executors and universal intromitters with my whole effects,  
 ' sums of money, &c., with all debts resting and owing to me at  
 ' the time of my death, whether the same are constituted by  
 ' bonds, bills and promissory notes,' &c. And after giving di-  
 rections for the disposal of ' my household furniture, silver plate,  
 ' &c., and a few trifling legacies, the deed proceeded : ' After  
 ' deduction of my deathbed and funeral charges, debts, ex-  
 ' penses that may be incurred, and special legacies before enu-  
 ' merated, I hereby give and bequeath the whole free residue of  
 ' my subjects and effects to my children, the said John Milne,  
 ' Alexander Milne, Isobel Milne otherwise Falder, and Mary  
 ' Milne otherwise Smith, to be divided equally, share and share  
 ' alike.' By a codicil added shortly afterwards she made an al-  
 teration, by which the residue was directed to be divided between  
 John and Alexander and Mrs. Falder, (her share being to her-  
 self in life, and her daughter in fee,) thus excluding Mrs.  
 Smith, in regard to whom the codicil bore, ' I leave and bequeath  
 ' to my said daughter, Mrs. Smith, the sum of £200 sterling ;  
 ' which is to be in full of all she can ask or claim from my estate  
 ' or effects.' Neither in the will, nor in the codicil, was there any  
 allusion to the power of distribution given her by her husband of



his effects; and the terms in which the funds and different subjects bequeathed by her were mentioned, were the same as if every thing had been her own private property. Mrs. Milne having died in 1823, a multiplepinding was brought by her executors, in which a claim was lodged by Mrs. Smith, not only for the special legacy of £200, to be ranked on any separate estate Mrs. Milne might be possessed of, but also for one-third of the free residue of her father's executry; and another by John and Alexander Milne and Mrs. Falder, demanding to be preferred, under Mrs. Milne's settlement, to the whole funds in medio, with exception of Mrs. Smith's legacy of £200. In support of Mrs. Smith's claim, it was pleaded, that although Mr. Milne had given power to his widow to distribute his estate and effects, she had not legally or effectually exercised that power, whatever it might be presumed she would have done, had she actually exercised it, there being no reference to his will in her settlement, which merely disposed of her own property; and that the residue of Mr. Milne's estate fell, therefore, to be divided according to the law of intestate succession. On the other hand, it was contended for John Milne, &c.,—1. That the widow was, by Mr. Milne's settlement, truly constituted proprietrix of his executry;—and, 2. That at all events, the power of distribution being in her, she had truly exercised that power by a distribution in terms of her husband's will. The Lord Ordinary repelled Mrs. Smith's claim, except, of consent, to the extent of the legacy of £200, and sustained that of John Milne, &c., preferring them to the whole remaining funds in medio; and the Court unanimously adhered.

**THE LORD ORDINARY** explained his views very fully in a note, leading to this conclusion, that 'in Scotland the law has not demanded an impossibility to impute the act done to any other motive than that of exercising the power, but is satisfied with evidence that the intention was to execute the faculty, rather than any thing else; and as Mr. Milne's whole estate was vested in the widow's person, and laid out either on bonds, bills, notes, or in some other way described in this will, it appears to the Lord Ordinary to amount even to the evidence required by the Lord Chancellor in the case of Andrews, viz. that it is impossible to impute her conduct to any other motive than that of exercising every power committed to her.'

**LORD GLENLEE.**—If a party having a power to distribute property not his own, make a will in which he conveys only his own property, without any reference to this power, it may, no doubt, be said that he has not exercised the power; but this principle is

coupled with the qualification, which is good sound law,—namely, that where the party who has such an interest in the fund as to give him reasonable grounds to consider it as his own property, and, having also the power of distribution, does distribute, it will be an effectual execution of the power. Now the widow here had every reason to believe that the funds left by her husband (there being no nomination of residuary legatees) were as much her own as any other property. There was sufficient to justify her in this belief; and as she had the power of distribution, I must hold her to have executed it.

**LORD PITMILLY.**—I have been convinced that the interlocutor is right, by studying the settlement and the note of the Lord Ordinary. I think the widow having held the property of her husband in her own name for fifteen years, and having no property of her own, it is clear that she could have nothing in view but the funds left by her husband.

**LORD ALLOWAY** concurred.—I do not understand the principles of some of the English cases quoted here, which seem to proceed on technicalities not admitted by us; but the general principle laid down in *Andrews v. Emmett* holds in our law, and applies to the present case.

**LORD ROBERTSON.**—If the widow had excluded any of the children, the case might have been different; but she has only exercised the power which she actually possessed.

**LORD JUSTICE-CLERK.**—Even if we were to be regulated by English authorities, I do not think that they are against the interlocutor. The true principle appears to be this—that when a power is given to a party to dispose of property, appearing on the face of the power not to be under his control, then a distribution, without reference to the power, is not an exercise of that power. But here the widow was appointed executrix, and was authorized to dispose of the estate, in the undisturbed possession of which she continued for fifteen years, and then she distributes it according to the directions of her husband, steering clear of what would have been a difficulty, had she cut out any of the children. Her distribution must, I think, be sustained.

*Mrs. Smith's Authorities.*—*Andrews v. Emmett*, (2. Brown's Chancery Cases, 297); *Nancock v. Horton*, (2. Vesey jun. 391); *Jones v. Curry*, (1. Swanston, 65); *Webb v. Honnor*, (1. Jacob and Walker, 352.)

*Miles's Authorities.*—Lord Thurlow in *Andrews v. Emmett*; Lord Eldon in *Nancock v. Horton*; Hope Pringle, June 21. 1677, (4102); Lady Kinfauns, June 23. 1698, (4106.)

J. H. ROBINSON, —MACMILLAN and GRANT, W. S.—Agents

LEECHMAN and EDINGTON, Pursuers.—*Moncreiff—Murray.* No. 414.  
 A. SIEVWRIGHT, Defender.—*D. of F. Cranstown—More.*

*Landlord and Tenant—Urban Tenement—Presumption.*—*Held.*—1.—That a party who had made an offer for and obtained an assignation to a lease, must be presumed, in the absence of all proof, to have seen the lease, and to be aware of a restriction as to the power of subsetting.—2.—That the using a shop in a good situation in a town, formerly occupied by a silk-mercier as a show-room for exhibiting wax figures, is an invasion which the landlord is entitled at common law to prevent.

LEECHMAN and EDINGTON, the pursuers, carried on business as silk-merciers in a shop in Hunter's square, Edinburgh, which they held by them, under a lease secluding subtenants and assignees, from the Merchant Company, of which Sievwright was a member. In 1822 they removed to the New Town, shortly after which they received an offer from Sievwright in these terms:—‘ I hereby make offer of £300 for the premises lately possessed by you in Hunter's square, from this date till Whitsunday 1825, the expiry of your lease; £60 payable at Martinmas next, and the remaining £240 by equal portions at the usual terms, from Whitsunday 1823 to Whitsunday 1825.’ This offer the pursuers accepted, ‘ subject’ (as stipulated in their missive of acceptance) ‘ to the following restriction, that the trade of silk-mercery shall not be exercised during the currency of the lease.’ In December 1823 Sievwright let the shop to one Hathaway for two months, for the purpose of being used by him for an exhibition of wax figures, and, as was also alleged, of ‘ a rare species of man, having scales on his breast and arms.’ Hathaway accordingly commenced his exhibition, which was put a stop to by a bill of suspension and interdict at the instance of the Merchant Company, narrating the improper use to which the shop had been put, and praying for an interdict, ‘ prohibiting the said Leechman and Edington, and the said Andrew Sievwright, from subsetting the foresaid shop, belonging to the said Company of Merchants, to the said Hathaway, or to any other individual, without consent of the said Company.’ No answers were given in to this bill, and Hathaway was afterwards interdicted and removed. Sievwright having refused to pay the £60, being the part of the rent payable at Whitsunday 1824, Leechman and Edington raised the present action; in defence against which Sievwright alleged, that when he took the shop, he explained to Leechman and Edington that he intended to sub-set the shop, but that they never exhibited to him their lease, or informed him that it contained a clause excluding subtenants and

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 F.

assignees; and he contended, that as liberty to sublet urban tenements is always to be presumed, the onus lay on them to show that they had acquainted him with the restriction, the more especially as the single condition contained in their acceptance of his offer led him to believe that there was no other restriction; and in reference to the alleged perversion of use, he pleaded that the interdict was not confined to that, but extended to all persons, not consented to by the Merchant Company. On the other hand, Leechman and Edington averred that they had not only exhibited to Sievwright the lease itself, but had shown him the letter giving them permission to sublet to him; but, from no witnesses being present, it was agreed on both sides that no proof could be had of the averments of either party. Leechman and Edington, however, contended,—1. That Sievwright, having alluded to the lease in his offer, must be presumed to have seen it;—and, 2. That, at all events, the use to which he had attempted to put the shop was one which the landlords were entitled to prevent, although there had been no exclusion of subtenants; and that the bill of suspension and interdict was, in fact, truly directed against this perversion. The Lord Ordinary decerned in terms of the libel, and the Court adhered.

**LORD ROBERTSON.**—The pursuers agreed to let the shop with one restriction only, and the fair *bonâ fide* construction is, that it was the only restriction. If, therefore, the defender makes out his averments, we must alter.

**LORD ALLOWAY.**—If there were any means of proof, it would be proper to allow an investigation as to the contradictory averments. But, as there are none, we must proceed on the general principles of presumption. At common law, Sievwright was not bound to suppose the existence of any restriction in an urban tenement; but as he knew of there being a lease, we must presume that he saw it, his attention being called to it, and it being his duty to have asked for it. With regard to the second point, I doubt exceedingly how far Sievwright was entitled to let the shop as a show-room, as the employment of it in this way must have been injurious to the shop and the surrounding property.

**LORD JUSTICE-CLERK.**—I do not think it necessary to assume that Sievwright saw the lease, but he ought to have made inquiry for it; and, if he had done so, and the pursuers had concealed it, they certainly could not have availed themselves of their evasion. As to the second point, I am very clear that an urban tenement cannot be perverted to a totally different purpose; and changing a silk-mercier's shop, in an excellent situation, into a show-room for wax figures, whether there was a scaly man or not, is a perversion

of use which a landlord is entitled to prevent; and there was no answer to the bill of suspension, explaining that in future it would be let for a fair purpose. The interlocutor must, I conceive, be adhered to.

LORDS GLENLEK and PITMILLY concurred.

JAMES LYON,—W. and A. G. ELLIS, W. S.—Agents.

W. COSSAR, Advocate.—*Jeffrey.*

No. 415.

Sir J. MARJORIBANKS, Respondent.—*Sol.-Gen. Hope—Anderson.*

*Sale.*—Circumstances under which a party who had employed another to purchase horses, and who alleged that his instructions had not been duly complied with, was found not entitled to return them.

ON the 21st of January 1819, Sir John Marjoribanks wrote to Cossar, a horse-dealer, that as ‘ I at present wish to get some carriage-horses, I will be obliged to you to come to me at Lees the first morning that it is convenient to you, as I wish to employ you to buy them for me.’ Cossar accordingly waited upon him, and it was alleged by Sir John—(and, in evidence of this, one witness was produced who stated)—that instructions were given that the horses should be at least sixteen hands high, and that Sir John should have the right to return any that might be sent, till he was satisfied. A few days after the meeting, Sir John wrote a letter on the subject to Cossar; but, although he mentioned several requisites, he did not state any thing as to the height of the horses. Cossar purchased a pair, and, according to agreement, he immediately drew upon Sir John, who had gone to London, for their price, being £157. 10s., and obtained payment. This pair, however, were immediately rejected by Sir John’s groom, as unsound. In the month of August thereafter, Cossar purchased another pair at Newcastle market, which were delivered to Sir John (who had now returned home) on the 12th of that month, the price being 160 guineas. Three days thereafter Sir John wrote to Cossar, saying, that ‘ I had only come home a few days before I saw you on Friday last. I never saw so unpleasant a trick as your man played in applying ginger to the horses. Horses on commission require no tricks on showing them, for you ought to have wished me to have seen them as fairly as possible. I looked at them with every attention next morning. They are a clever pair of carriage-horses, but not what I wanted or ordered in point of size. My order was to get me handsome horses, full sixteen hands. They are, I am sorry to say, much

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‘below it; but the price you name you cannot be serious about. ‘They are not horses of that money by a great deal.’—‘I shall settle for the horses, and whether we are to deal in future will depend on that settlement.’ One of the horses, it was discovered, was a shy feeder, but no complaint was made at this time on that subject. At the distance of about three weeks from this letter, the parties had a meeting, at which a state of accounts was made out, when Sir John, after being charged for the price of the horses, and also of a pair of farm-horses which he had bought, and receiving credit for the price of the pair which had been returned, paid the balance, being £96. 10s., to Cossar. By Sir John it was alleged that Cossar had agreed to exchange the horses; but the latter stated that this was only to be on the footing of a new transaction, to be made when he got horses to please Sir John, and not because he was under any obligation to take back the horses. On this matter there was no satisfactory evidence on either side. Soon thereafter Sir John presented a petition to the Sheriff of Berwickshire, praying him to ordain Cossar to take away the horses, and to find him liable in the price thereof, or otherwise to grant warrant for selling them by public roup. After a long litigation the Sheriff decerned against Cossar, who then brought an advocacy, on the ground,—1. That as he had been employed merely as the mandatory or agent of Sir John, it was necessary, in order to entitle him to return the horses, to establish a fraud, or such negligence as implied fraud, but that no such charge had been established.—2. That it was not true, and there was no evidence, that Sir John had instructed him to purchase horses of the height of at least 16 hands;—and, 3. That in consequence of the settlement made three weeks after the horses had been in the possession of Sir John, he had no right to insist on returning them, and opening up the whole transaction. To this it was answered,—1. That although Cossar had been employed to buy horses, yet it was on the condition that he should purchase such as were satisfactory to Sir John, and particularly in point of height;—and, 2. That the settlement was made on the footing that Cossar was to procure a new set of horses for Sir John, without delay, in place of those which he had delivered; but that he had failed to do so. The Lord Ordinary advocated the cause, assolizied Cossar, and found him entitled to expenses; and the Court adhered.

The Court were chiefly influenced, in pronouncing the above judgment, by the circumstance that Sir John did not at once object to the horses, which, if they were not of the proper size, he must have

immediately seen; that it was admitted they were a clever set of horses; and that, at the distance of three weeks, a settlement was made, and a balance paid.

G. HOGARTH, W. S.—CUNNINGHAM and BELL, W. S.—Agents.

D. S. BUCHANAN, Pursuer.—*Cockburn—Cowan.*

No. 416.

Sir W. CUNINGHAME, Defender.—*M<sup>r</sup> Farlan.*

*Valuation.*—Decree of division of cumulo valuation reduced, as pronounced without evidence of the extent of the parcel of lands as to which the division was made.

IN the cess-books of the county of Ayr, there had always stood an entry of the lands of Inchgotrig generally as valued at £100 Scots. The dominium utile of all the parcels of lands passing under this name had been possessed as one property for at least upwards of a century, and now belonged to the defender, who was likewise infeft in the superiority of a temple merk land of Inchgotrig; and, on the other hand, the pursuer and his authors possessed by regular titles the superiority of a four merk land of Inchgotrig. In 1822 the defender presented a petition to the Commissioners of Supply, alleging that Wester and Middle Inchgotrig fell under his titles of superiority, and praying to have the cumulo valuation of £100 divided. No evidence was led to show the extent of the several parcels as distinct from each other, or that Wester and Middle Inchgotrig were the defender's temple merk land. The Commissioners, however, adopted a plan of the lands drawn out by a surveyor, as fixing the extent of the several portions; and on an estimation by the surveyor and another person of the value of the parcels so divided, they pronounced a decree of division, finding the valuation of Wester and Middle Inchgotrig to be £75 : 9 : 1, and of Easter Inchgotrig £24 : 10 : 11. Of this decree a reduction was brought by the pursuer's authors, in which the Lord Ordinary found, 'that there was no evidence produced or offered which is sufficient to show the extent or valuation of the said temple lands, as distinct from the lands of Inchgotrig, not being temple lands, to have been such, or in such proportions as has been found by the Commissioners of Supply in the decree under reduction,' and reduced the decree accordingly. The Court unanimously adhered, recalling at the same time certain findings as to whether the temple lands of Inchgotrig in the defender's titles were included under the cumulo valuation, in reference to which the defender had raised an action of declarator, which had been conjoined with the present process.

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Lord Mackenzie.  
M<sup>r</sup>K.

**LORD JUSTICE-CLERK.** — There was no evidence produced to the Commissioners, to show that the defender possessed any thing more than a single one merk temple land of Inchgotrig, or what formed Easter or Middle Inchgotrig. Neither was there any evidence of the actual value of the lands, and yet the Commissioners have found the valuation of the defender's one merk land to be £75 odds, and that of the pursuer's four merk land only £24 odds. Their decree must undoubtedly be reduced.  
The other Judges concurred.

**HUNTER, CAMPBELL, and CATHCART, W. S.—R. JAMIESON, W. S.—**  
Agents.

**No. 417. W. EATON and H. COWAN, Petitioners.—Fullerton—Jameson—Cowan.**

**A. MURDOCH, Respondent.—Greenshields.**

**Cautions—Curator Bonis.**—Held that the cautioners of a curator bonis appointed to persons in a state of imbecility, were liable for the price of heritable property sold by the curator under warrant of the Court, obtained in an action of sale subsequent to the date of the bond, and in which he was the sole pursuer.

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1st Division.

Lord Medwyn.

H.

By a disposition and deed of settlement of the 17th of October 1792, Daniel Fraser conveyed his whole heritable and moveable estate to John Smith in liferent, and to Robert Watson junior and John Watson equally in fee. Robert and John Watson fell into a state of great imbecility both of body and mind, amounting almost to lunacy; and an action of aliment having been brought by them against the liferenter, it was ordered that the moveable funds should be uplifted for their support as occasion required, and that the liferenter should be entitled to the interest of those sums, either out of the moveable funds or the heritable subjects. In 1812 the moveables were found to be exhausted, and a commission was granted to John Aitken by the father of the two Watsons, and by one of them who had occasionally lucid intervals, for managing the heritable property. In consequence of the moveable funds being exhausted, and the rents of the heritage being payable to the liferenter, Aitken, as commissioner, applied to the Court for warrant to sell the property; but this was refused. An application was then presented for having Aitken appointed curator bonis to the Watsons, which was granted on the 12th of November 1815, and Messrs. Eaton and Cowan became bound as his cautioners. By the bond they obliged themselves, that 'I the said John Aitken shall duly and faithfully manage the means and estate belonging to the said Robert Watson dur-



ing the subsistence of their infirmity, or till the curatory shall be recalled; that I shall make inventories thereof, and do exact and timeous diligence for recovering the same, and shall hold just count and reckoning for my intromissions in the said act of curatory during the continuance thereof, and make payment to such person or persons as the said Lords shall appoint; and that I shall obtemper, fulfil, and obey the whole rules and regulations prescribed by the acts of sederunt to be observed by Lords' factors, under the penalties, and with certification, as therein contained.' The Watsons were never cognosced by a jury; and, soon after his appointment, Aitken, as their curator bonis, raised an action of sale of the heritable property. In this process he appeared as the sole pursuer, and among others, he called the two Watsons as defenders. The summons was not executed against them, but letters were produced from them dispensing with the induciæ. Neither of the cautioners were made parties to this process, but the above letters were in the handwriting of Mr. Eaton. A proof of the necessity of the sale having been allowed, he officiated as commissioner, and his son as clerk, in taking the proof. No tutor ad litem was appointed to the Watsons, and, after the usual proceedings, a warrant of sale was granted, which was executed in February 1817, on which occasion Mr. Eaton acted as judge of the roup. After discharging all claims on the property, a balance of £3000 was paid to Aitken. In 1823 his estates were sequestrated, and he was discharged on a composition of 6s. 3d., and he died in the following year. A petition was then presented by Messrs. Eaton and Cowan, praying, that upon the balance legally due upon the curatorial accounts being ascertained and paid by them, their bond of caution might be delivered up, and a discharge granted to them. In the mean time the respondent Mr. Murdoch had been appointed curator bonis in place of Aitken; and a remit having been made to an accountant, he reported that the balance due by Aitken was about £3200, arising from the price of the heritable property, and interest thereon. Objections having been lodged by Messrs. Eaton and Cowan to this report, the Lord Ordinary appointed them to be stated to the Court in Cases. Against their liability for the above balance they contended,—

1. That Aitken being a mere curator bonis, appointed for the management, and not for the disposal of the property, had no power, even with the sanction of the Court, to sell the heritable property.—
2. That, at all events, and as the Watsons had never been cognosced by a jury, he could not competently act as sole pursuer of the action of sale, and therefore the whole proceedings

in it were null and void.—3. That it was quite irregular to call the Watsons as defenders, and still more so to found on letters from them dispensing with the execution of the summons; and, besides, no tutor ad litem had been appointed to them;—and, 4. That the bond of caution merely applied to the due exercise of the powers bestowed by the Court on Aitken at the date of his appointment, among which unquestionably they did not then confer a power of sale; and that for the exercise of any subsequent power or authority granted to him by the Court, and more especially where it was of an extraordinary nature, and to which they were not called as parties, they could not be responsible. To this it was answered,—1. That the sale having been made by authority of the Court, and by Aitken in his official capacity, must be held valid till set aside.—2. That the cautioners had bound themselves to be responsible for the intromissions of Aitken with the estate of the Watsons, and that as he had intromitted with the price, and was unable to pay it, they were accountable for the amount;—and, 3. That they, or at least Mr. Eaton, were barred from objecting to the sale in the circumstances under which it had been made. The Court approved of the report of the accountant, repelled the objections, and found Messrs. Eaton and Cowan liable for the balance reported by him.

**LORD BALGRAY.**—The factor in this case got the funds of the lunatics into his hands, and for his management of these funds the cautioners must be responsible. Besides, I cannot lay out of view that they were in the knowledge of all that was done.

**LORD PRESIDENT.**—In such cases as this, the cautioners are bound to look after the proceedings and conduct of their principal. If they had conceived that he was acting wrong, they might have complained to the Court, and have had him restrained. The lunatics could not attend to this. The cautioners are liable for every act of the factor's management, and it is just for acts such as the present that they become bound. If Aitken had sold without any authority at all, and had received and spent the price, would they not have been liable? I apprehend that they would, and if so, they must be liable where he acted with authority. Indeed, there would be no end to objections, if the cautioners were allowed to inquire into the grounds of the factor's proceedings.

**LORD CRAIGIE.**—I conceive that if the obligation of cautioners can be extended in this manner, no person will ever undertake such an obligation, because it will be impossible to tell what may be the extent of the responsibility. The sale was a bad sale, and was utterly null. It is said to have been advantageous for the wards; but that is of no consequence in this question. Such a

thing could never have been in the contemplation of the cautioners, and does not fall under their bond. The sale being utterly null, the curator had no right whatever to receive the price; and if it be said that he acted under the authority of the Court, which I do not conceive was sufficient, then he acted by virtue of new powers bestowed subsequent to the date of the bond. I remember the case of a messenger which is very like the present. He was employed to execute diligence by poinding, but, instead of confining himself to this, he thought fit to sell the goods of the debtor, and having misapplied the price of them, an action was brought against his cautioners for their value; but they were assolizied, because it was not in his character, nor within his powers as a messenger, that he sold the goods.

**LORD GILLIES.**—The curator applied to this Court for a warrant to sell *qua curator*. If he was wrong in this he was to blame; and this is just one of his acts for which the cautioners are liable. There may be some limit to the responsibility of the cautioners for such acts; but the cautioners here carry their plea to an absurd extent. They say that, so far as the curator did right, their obligation is good; but that, whenever he went wrong, then he went beyond his powers, and they are not liable. This, however, is a doctrine to which we cannot listen. They are responsible, whether he act within or beyond his powers. Perhaps he acted beyond them in this case, but still they are answerable for the consequences. Besides, the money was due to him as curator, and he received and misapplied it in that capacity. It is clear, therefore, that under the terms of their bond they must be liable.

*Petitioners' Authorities.*—Bell, March 16. 1794, (16807); Hay, June 20. 1811, (F. C.); Robertson, May 23. 1814, (F. C.); Govan, Dec. 20. 1814, (F. C.); M'Kay, March 9. 1796, (16384); Colt, June 2. 1749, (17040); *Us. of Glasgow*, Nov. 18. 1790, (2104); Houston, March 4. 1820, (F. C.); M'Neil, Nov. 18. 1823, (ante, Vol. II. No. 485.)

**H. COWAN, W. S.—W. PATRICK, W. S.—Agents.**

**Madame SASSEN, Pursuer.—Napier.**

**No. 418.**

**Sir JAMES CAMPBELL, Defender.—A. Wood.**

*Process.*—Held that forthcomings on arrestments used under a decree and interim execution pending appeal, ought to be brought before the Division which gave decree.

**LORD CRINGLETIE** reported that Madame Sassen had used arrestments to secure the aliment awarded by the First Division, for which execution pending appeal had been granted in her action against Sir James Campbell, (see ante, Vol. III. Nos. 114 and 115,) and had brought a forthcoming before his Lordship, which he

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had entertained, not adverting to the circumstance that the cause in which decree had been given belonged to the First Division, and she now had claimed the expenses of these arrestments and forthcoming, which was resisted on the ground of the reversal by the House of Lords of the decree under authority of which the arrestments were used, and he submitted that the case ought to be remitted to the First Division. The Court unanimously remitted accordingly.

No. 419. *Mrs. COLQUHOUN and Others, Pursuers.—Sol.-Gen. Hope—Forsyth.*

*JAMES M'KAY and Others, Defenders.—Cockburn—Jameson—Wilson.*

*Marriage-Contract—Testament.* — Question raised, but not decided, whether it is a sufficient rational cause to support a bond granted by a husband, (whose post-nuptial marriage-contract provided all the property of the spouses to the longest liver in liferent, and the children of the marriage in fee,) that its object was to restore to one of his wife's two daughters by a former husband a share of their father's property left by one of them to her mother by a testament executed in minority, this property having been changed from heritable to moveable by the act of a factor loco tutoris.

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Lord Mackenzie.

M'K.

THE pursuer, Mrs. Colquhoun, had two daughters, Jean and Mary, by her first husband, James Walker, who died intestate in 1800, leaving two leases, one having seven and the other eighteen years to run. At this period both the children were pupils; and their mother having retained possession of the farms, application was made by their relations for the appointment of a factor loco tutoris. Ferguson, a dike-builder in the neighbourhood, was accordingly appointed, and brought a removing against the mother, in which, after considerable opposition, he obtained decree. Instead, however, of carrying it into effect, he entered into an arrangement with her, whereby he assigned to her the two leases, and likewise all the moveable property of which her husband had died possessed, on receiving, for behoof of his pupils, the sum of £640, and an obligation on her part to maintain and educate them till the date of the expiry of the leases. A few years thereafter the pursuer married a second husband, the late Walter Colquhoun; and having had two children by him, a postnuptial contract of marriage was, in 1814, entered into between her and her husband, by which they conveyed 'to and in favour of themselves and the longest liver of them in liferent, for their liferent use allanarly, and to Walter Colquhoun, their only

'son, and the heirs lawfully to be procreated of his body, whom 'failing, to Magdalen Colquhoun, their only daughter,' and any other children to be procreated of the marriage, in fee, all heritable and moveable property 'belonging or which shall be belonging' to either of the spouses. A few months after the execution of this deed, Jean Walker, who was at this time only sixteen years of age, executed a testament bequeathing her property to her mother, to the exclusion of her sister Mary. It was admitted that Jean was then on deathbed, and that she died a few days afterwards, but parties were not agreed as to whether she had been to kirk or market after executing the will. In 1817 Mr. Colquhoun granted to the defenders, M'Kay, &c., for behoof of Mary Walker, a bond payable at Whitsunday 1820 (about which period she would have attained majority) for £551. 12s., being the exact amount of Jean Walker's succession and interest to the term of payment; but the narrative of the bond bore it to be for money borrowed from Mary Walker. Colquhoun died in January 1820, a few months prior to the bond falling due. Mary Walker had been previously married to William Jeffrey, and had since died, leaving two children, for whose behoof an action of constitution on the bond was raised against Mrs. Colquhoun and her two children, as representing the late Mr. Colquhoun. This process was met by a counter action on their part, concluding for reduction of the bond on several grounds, but chiefly on this, that it had been granted in fraud of the postnuptial contract of marriage between the spouses. The Court (Dec. 11. 1823) repelled all the other reasons of reduction, but remitted to the Lord Ordinary to hear parties on the question, 'whether the bond brought 'under challenge was granted contra fidem tabularum nuptialium.' On the part of the defenders it was then pleaded,—1. That as the bond was intended to take effect before the granter's death, being payable at a term certain, it was an act of administration from which the granter was not restrained by the contract;—and, 2. That it was a reasonable deed on his part; in support of which they stated, in a condescendence ordered by the Lord Ordinary, (but which was not printed when the cause came before the Inner House,) a number of circumstances, and particularly that the funds of the two children, Jean and Mary Walker, had been improperly changed from heritable to moveable by the factor loco tutoris, who had no power to invert its nature, so as to enable Jean Walker to test on it, she being in minority; that the testament was executed on deathbed, and that it had been imputed from her by unfair means; and therefore they contended that it was a reasonable deed on the part of Colquhoun to restore

to Mary Walker that succession of which she had been so illegally deprived by her sister's invalid testament. The Lord Ordinary found ' that the postnuptial contract executed by the late Walter Colquhoun was not reducible nor revocable in whole or in part, ' and therefore that Walter Colquhoun was not entitled to do any ' deed in fraudem of this contract: That the bond under reduction was in substance a conveyance over to Mary Walker of the ' property, which, in exclusion of Mary Walker, the heir ab intestato, had been conveyed to Mrs. Colquhoun by the settlement of Jean Walker, and so passed to Walter Colquhoun by ' his *jus mariti*: That, therefore, the question whether Walter Colquhoun was entitled to execute that bond, depends on the ' question whether he had good reason for declining to take benefit by that settlement to the prejudice of Mary Walker: That ' it is alleged he had such reason, in respect that Jean Walker ' was induced to execute the settlement by unfair means used on ' the part of Mrs. Colquhoun, and finds this allegation wholly ' denied; and therefore remits the case to the Jury Court.' Against this interlocutor the defenders reclaimed, and contended that if the cause was to be remitted to the Jury Court, they ought not to be confined to the proof of Jean Walker's settlement having been obtained by unfair means, as the only circumstance relevant to infer that the bond was a reasonable deed on the part of Colquhoun. The Court unanimously recalled the interlocutor, and remitted to the Lord Ordinary to reconsider the cause, and to do therein as to his Lordship should seem just.

**LORD GLENLEE.**—It is scarcely necessary, in order to decide this case, to have the condescendence printed as now moved for. There may be as much rationality in declining to take benefit by a will which a minor had not power to make, as by one unfairly obtained. Now, I cannot conceive how any act of the *factor loco tutoris* could convert heritable into moveable property. If the transaction with the mother could be held good at all, the money received for the pupils must be considered as a *surrogatum* for the heritage. Jean Walker's power of testing at all on this property (she being a minor) being so very exceptionable, was a reasonable consideration for Colquhoun granting the bond, and therefore the interlocutor goes too far in limiting the test of rationality to the money being unfairly obtained. No doubt, the bond is on a false narrative; but if a man chooses to acknowledge a debt where none is due, that is not, *per se*, sufficient to reduce it.

**LORD ROBERTSON.**—It is much better to send the whole averments to the Jury Court.

**LORD PITMILLY.**—I am clearly of opinion that the findings in the

interlocutor should be recalled; but there is some difficulty as to further disposing of the cause. If it could not be decided without the facts as to the alleged unfair manner of obtaining Jean Walker's settlement being determined, there might be a remit to ascertain them; but, on the grounds of law stated by Lord Glenlee, I would have assolizied without investigating as to this point. At the same time, if wished by the Court, I shall not object to a remit to the Jury Court; but it should be done before answer, and without the Court being restricted by these findings.

**LORD ALLOWAY.**—I concur with Lord Glenlee, and see no occasion for a remit to the Jury Court at all. It is clear that a minor cannot test on heritage; and if the leases had remained as at Walker's death, Jean Walker could not have tested, even though she was not on deathbed, which would have been matter of proof. But the factor loco tutoris had no power to invert the property. Even a regular tutor could not have altered the property, so as to affect succession or the power of testing; still less could the factor; and, laying all the contradicted averments aside, this one fact constituted a sufficient reasonable cause for granting the bond.

**LORD JUSTICE-CLERK.**—I am of the same opinion. It is impossible to confine the question of rationality to this one point of unfairness, which is comparatively of trifling importance. We must undoubtedly recall the findings in this interlocutor, and if the cause is to go to the Jury Court at all, it ought to be sent generally to ascertain whether the bond was a rational deed; but I would not adhere even as to the remit, in order that the Lord Ordinary may have an opportunity to reconsider whether it is necessary at all.

**TOD and WRIGHT, W. S.—D. BROWN, W. S.—Agents.**

**W. SELKIRK, Pursuer.—Sol.-Gen. Hope—W. Bell.**

**W. LAIDLAW, Defender.—Fullerton—Graham Bell.**

No. 420.

*Stat. 4. Geo. IV. c. 49.—Road Statute—Jurisdiction.*—Held incompetent under the above statute, after the lapse of six months, to review by reduction a decree of Justices of the Peace pronounced under a local statute.

**SELKIRK** brought an action of reduction and of damages against **Laidlaw**, tacksman of the Kenmure toll-bar near Jedburgh, concluding for reduction of a decree of the Justices of Peace of the county of Roxburgh, dated 4th May 1824, ordaining him to pay £3. 10s., besides £1. 15s. of expenses. The summons was dated and signeted the 15th of June 1825, and the main ground on which it was rested was, that although it is declared by the road statute of Roxburghshire 'that no toll whatsoever shall be de-

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‘manded or taken for horses or cattle going to or returning from water or pasture, from one parish to the next adjoining parish, or which shall not pass upon any turnpike road, more than for the space of two miles in going to or returning from water or pasture;’ and although it had been alleged that he had driven a flock of sheep from a field on to the road, and had thereafter passed through a grass field to evade the toll, yet, in point of fact, he had been driving the sheep belonging to his master from pasturing on one part of the farm to another part of it, and did not pass along the road more than 100 yards. He therefore contended, that the decree by which he was made liable for the penalty in the statute was ultra vires. In defence against this action it was stated, that by the general turnpike act, 4th Geo. IV. c. 49, § 118, it is enacted, ‘That all prosecutions for the penalties imposed by this act or any turnpike act, or for *any wrongs done*, or injuries suffered in any matter thereto relating, or for any thing done in pursuance of any of the powers by this act or any turnpike act given and granted, shall be commenced within six months after the penalty, forfeiture, or fine is incurred, or wrong done, or injury suffered, or fact committed, and not afterwards;’ and that as this action had not been brought within six months, and as it was rested on the allegation that a wrong had been done by the institution of the proceedings complained of, and an injury suffered in consequence of the decree pronounced under the statute, the action was incompetent. To this it was answered, that as the Justices had gone beyond the powers conferred on them by the statute, the action was perfectly competent. The Lord Ordinary ‘repelled the preliminary defence founded on the act of Parliament 4th Geo. IV. c. 49.’ But the Court, after hearing parties, and taking time to consider, altered the interlocutor, and dismissed the action as incompetent.

**LORD GILLIES.** — The general statute was not intended merely to regulate road acts to be made subsequently to it, but to apply to and govern existing local acts. We must therefore confine our attention to that statute, so that this decision is one of very general application. The question therefore is, whether this case falls under the limiting clause of that statute? The word ‘prosecution’ is a generic term, meaning every species of suit at law. Now, the statute says, that ‘all prosecutions for penalties, &c. or for any wrongs done or injuries suffered, &c. shall be commenced within six months after the wrong done or injury suffered.’ Now, was there a wrong done here? The pursuer avers that there was, and that that wrong arose from the act of the defender in bringing him before the Justices. No doubt, he says that it was truly the



Justices who did the wrong, and that the decisions of Courts of Law, however erroneous, cannot be characterized as wrongs. But if there was a wrong done at all, which he says there was, it was by the defender who raised the prosecution, and not by the Justices. Therefore, in this view, I apprehend that the action is incompetent.

The other Judges were disposed at first to repel the defence; but, on taking time to consider, the Court sustained the objection, and dismissed the action.

D. M'LEAN, W. S.—J. MARSHALL,—Agents.

R. M'GILLIVRAY, Suspender.—*Murray—Ivory—Henderson jun.* No. 421.

P. M'ARTHUR, Charger.—*Moncreiff—Maitland.*

*Debtor and Creditor—Assignment of Debt.*—Circumstances under which the holder of a bond in which three cautioners were bound, was found not obliged to assign it to a third party; but that he was bound to do so in the event of a tender being made of full payment.

ROBERTSON, a merchant in Inverness, obtained a cash credit from the Bank of Scotland with their agent there for £500; and a bond was executed by him along with the Rev. William Findlater, the Rev. Robert Findlater, and the suspender M'Gillivray. Robertson became insolvent, and executed a trust-deed for behoof of his creditors in favour of the charger M'Arthur. Thereafter M'Arthur paid the amount of the bond to the Bank, and obtained an assignation to it in his own favour. No dividend had been made on Robertson's estate; and M'Arthur having demanded payment from M'Gillivray, Mr. Thomson, a friend of M'Gillivray, wrote to M'Arthur, stating, that 'if your object is to force Mr. M'Gillivray, one of the cautioners, to pay the whole amount by proceeding with personal diligence against him, I am ready to render such proceedings unnecessary by paying down the amount, on getting an assignation, under deduction of the dividend from William Robertson's estate, who is the primary obligant, and for whom you act as trustee. If, again, you only mean to charge M'Gillivray for his proportion, I am also ready to render this unnecessary by paying you such proportion, upon getting an assignation to the bond to that extent, that I may operate my relief.' In answer to this, M'Arthur wrote, 'I am sorry being obliged to decline granting you an assignation to the whole or any part of the bond. On looking over the bond and assignation, I find you are noways interested in either; and, therefore, unless you connect yourself with one or

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‘ other of the parties to the bond, I cannot, of course, sanction  
 ‘ your interference in the matter. I shall regret much being  
 ‘ obliged to execute diligence against any of the parties interested ;  
 ‘ and, with the view of preventing such an unpleasant step, it is  
 ‘ my intention to intimate to the cautioners, that in the event of  
 ‘ each of them finding me security for the payment of one third  
 ‘ of the balance due me after the division of William Robertson’s  
 ‘ estate shall take place, I will not only delay taking steps against  
 ‘ them, but will discharge the bond. Thus, you will observe, my  
 ‘ only wish is, that the cautioners be equally dealt with, and that  
 ‘ no one of them be obliged to pay more than the other. This  
 ‘ offer I shall make them under the express condition, that if it  
 ‘ is not accepted of, I shall be entitled to proceed with diligence  
 ‘ for recovery of the debt, as if I had made no such concession.  
 ‘ I am, besides, ready to grant an assignation to any one of the  
 ‘ parties in the bond on payment of the debt ; or I shall grant  
 ‘ any one of the cautioners a discharge, on his finding the security  
 ‘ I have already mentioned.’ At the same time he wrote a letter  
 to M’Gillivray to the same effect. In reply, Thomson stated on  
 the part of M’Gillivray, that that person could neither pay nor  
 find security for any part of the bond ; but that he, Thomson,  
 still adhered to the offer which he had made. M’Arthur then  
 charged M’Gillivray for payment of the full debt ; and the estates  
 of the latter having been sequestrated, a suspension was presented  
 by him and his trustee, on the ground, *inter alia*, that M’Arthur  
 was bound to have complied with the offer made by Thomson,  
 and to which he still adhered. To this it was answered, that as  
 Thomson had no connexion with the bond, M’Arthur was not  
 bound to receive payment from him, under deduction of the divi-  
 dend, or to assign the bond to him ; but that he was still ready to  
 receive payment of M’Gillivray’s proportion of the bond, to restrict  
 his claim against him to that amount, and to grant him a discharge.  
 The Lord Ordinary suspended the letters *simpliciter*, ‘ in respect  
 ‘ of the charger’s refusal of the whole debt upon an assignation,  
 ‘ and his refusal of payment of a part of the debt on an assigna-  
 ‘ tion in relief to the extent of that part.’ But the Court altered  
 the interlocutor, and, of consent of the charger, restricted the  
 charge to the one third part of the debt, after deducting any  
 sums which he had recovered from Robertson’s estate ; ‘ found  
 ‘ that the charger was entitled to refuse granting an assignation  
 ‘ to the bond, or to any part of it, to Mr. Thomson, on the terms  
 ‘ required by him, and to that extent repelled the reasons of sus-  
 ‘ pension ; but further found, that in the event of any third party  
 ‘ tendering to the charger the full payment of the sum in question

‘as now restricted, he, the charger, is bound to grant to such third party, and at his expense, a valid and effectual assignation to the sums so tendered and paid, to the effect of enabling the assignee to recover the contents of the assignation from Robert M’Gillivray, and from the said William Robertson and his estate, as accords; and remitted to the Lord Ordinary to hear parties on the other points in the cause, and to do otherwise as to his Lordship should seem proper.’

*Suspender’s Authority.*—Milne, March 7. 1822, (ante, Vol. I. No. 430.)

D. HOUSTON,—R. M’KENZIE, W. S.—Agents.

G. HUNTER and COMPANY, Advocators.—*Sol.-Gen. Hope—* No. 422.  
*Wilson.*

P. LEVY and COMPANY, Respondents.—*Cockburn.*

*Previous Expenses.*—Held that a party successful in the Inferior Court is not necessarily to be subjected in payment of all the previous expenses, before being allowed to lead additional proof in an advocacy by his opponent.

AFTER the bill of advocacy, mentioned ante, Vol. III. No. 404, had been passed, the expedite letters came to be discussed before Lord Cringletie, who appointed Levy and Company to condescend on the additional proof which they proposed to lead. Condescendences and answers were accordingly given in; and, after some discussion, the Lord Ordinary delivered his opinion that Levy and Company, as a condition of being permitted to go into any further proof, should be obliged to pay all the previous expenses, both in this and in the Inferior Court. Thereupon Levy and Company preferred resting their cause on the proof already taken before the Sheriff, (who had given judgment on it in their favour,) and withdrew their condescendence. The Lord Ordinary then found them liable in the expenses incurred since the case was remitted from the Inner House. Against this interlocutor Levy and Company reclaimed, stating that they were willing to pay the expense attending the condescendence and answers which they had withdrawn, but that they ought not to be subjected in any thing further. The Court unanimously recalled the interlocutor as craved, and re-

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In the case of *Fraser v. M’Kenzie*, 10th June, the Court refused to receive notes of pleas in law containing argument, and declared they would strictly enforce the statute, which requires that they shall be ‘short and concise,’ and ‘without argument.’

stricted the expenses to those relative to the condescendence and answers.

**LORD GLENLEE.**—If a party has all along been unsuccessful in the Court below, and has not led all the proof in his power, I can very well understand, when he brings the case here, that he should not be allowed to lead further evidence, without payment of previous expenses; but if he brings sufficient evidence to satisfy the inferior Judge, (as was the case here,) and gains his cause, I have no conception that he should be obliged to pay all the previous expenses; before he is allowed to bring additional proof in support of the judgment in his favour. As Levy and Company, therefore, withdrew their condescendence only on the threat of being subjected in payment of these expenses, we cannot saddle them with those found due by the Lord Ordinary.

**LORD ALLOWAY.**—If Levy and Company had not given up their condescendence, I should have doubted very much whether the previous expenses should have been found due, before allowing them to prove their averments; and had they not consented to pay that part of the expense relative to the condescendence, I could not have found them liable in a penny.

**LORD JUSTICE-CLERK.**—When the bill of advocacy by Hunter and Company was formerly before the Court, two of the Judges were of opinion that the Sheriff's judgment in favour of Levy and Company was right, even as the proof stood; and I am clearly of opinion that the Lord Ordinary should not have made payment of the previous expenses a condition of their being heard, and that we can only find Levy and Company liable for those expenses which they have consented to pay.

The other Judges concurred.

**GREIG and PEDDIE, W. S.—D. BRASHE,—Agents.**

**No. 423.**     **A. WISHART, W. S. Pursuer.—Sol.-Gen. Hope—Dundas.**  
                   **J. M'KEAN, W. S. Defender.—More.**

*Multiplepounding.*—Circumstances held sufficient to excuse the raiser of a multiplepounding in bringing it, although not absolutely necessary.

**June 10. 1826.**     **WISHART**, as representing the late Miss Hope Balfour, who died in April 1824, was liable in payment of an annuity of 50 guineas to Mrs. Glass. Shortly before Miss Balfour's death, an assignation of this annuity for two years by Mrs. Glass to one Davidson, in payment of £100 advanced by him, had been intimated, and soon thereafter an arrestment of the same fund was used by Muir, a creditor of Mrs. Glass. In September 1824, an intimation

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was made to Wishart of a second assignation by Mrs. Glass in favour of M'Kean, W. S.; and, in the month following, a further arrestment was used in his hands by another of her creditors. At the term of Martinmas following, M'Kean having demanded payment of the annuity in virtue of his assignation, Wishart declined to pay till the arrestments were loosed, and evidence of Davidson's assignation being discharged produced. M'Kean accordingly, on the 13th November, showed Wishart the assignation to Davidson with a discharge indorsed on it, and likewise a letter from Muir, the first arrestee, purporting that his debt had been paid; but he did not leave these documents with Wishart; and in three days thereafter M'Kean raised an action against him for payment of the annuity. Thereupon Wishart brought a multiplepoinding, which the Lord Ordinary dismissed as improper and unnecessary,—stating, as the ground of his decision, that the discharge by Davidson on the back of the assignation was sufficient without any regular deed of retrocession,—that such discharges of deeds in security required no additional stamp, and that an arrestment posterior to an intimated assignation by a creditor, not of the assignee, but of the cedent, did not interpell the debtor from paying to the assignee, or warrant his bringing a multiplepoinding. The Court, however, while they held the multiplepoinding not to have been necessary, recalled his Lordship's interlocutor, and found Wishart liable in once and single payment, but not entitled to expenses.

The Court were agreed that there was no double distress; but the majority of their Lordships were of opinion, that M'Kean having allowed Wishart only five days from the term, before bringing his action for payment, to consider whether he was safe to pay, the latter was excusable in raising a multiplepoinding, and that the preferable course for the Lord Ordinary to have followed was to have entertained the process, but not to have allowed Wishart his expenses.

A. WISHART, W. S.—J. A. CHEYNE,—Agents.

No. 424.

HUGH BOGLE and Others, Pursuers.—*Skene*.  
JOHN HENDERSON and Others, Claimants.—*M'Neil*.

*Multiplepinding—Consignation.*—Raisers of a multiplepinding being also mandatories of claimants, held entitled to deduct their own claims from the amount to be consigned by them.

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THE late David Henderson, of the island of Jamaica, appointed Gray, and certain other persons residing in the West Indies, his trustees for managing his property, and paying it over in certain shares to his children on their attaining majority. Part of the funds consisted of a debt owing by the late George Bogle, merchant in London; and arrestments having been used by the children of Henderson, who had attained majority, in the hands of some of Bogle's executors residing in Scotland, they raised a multiplepinding, in which they lodged a condescence of the balance in their hands, as being £4731. Being afterwards, however, appointed mandatories of Henderson's trustees, and having lodged a claim on their behalf for a certain sum as commission, and for the share of one of the children who had not attained majority, they contended that to this extent they were not bound to consign the fund in medio; and as they represented Henderson's trustees, who were, quoad the commission, creditors of the children, they were entitled, like defenders in an ordinary action, to retain any sum due to them; and that the fund in medio was only the balance, after deduction of all the claims of the holders. The Lord Ordinary appointed the raisers to consign the whole fund; but the Court altered, so as to except from consignation the amount claimed as commission by Henderson's trustees.

G. DUNLOP, W. S.—Agent for Pursuers.

No. 425.

W. HOGG, Advocate.—*Jeffrey—Fletcher*.  
C. Low, Respondent.—*Cunninghame*.

*Reference to Oath—Prescription.*—Held,—1.—That the holder of a fund in a forthcoming is entitled to prove counter claims by the common debtor's oath, in a question with the arrestee.—2.—That a process of sequestration by the landlord is a bar to the quinquennial prescription of rents;—and,—3.—That judicial cautionary obligations are not subject to the septennial prescription.

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JAMES Low was tenant of a piece of ground called Medical-field, belonging to Dick, a surgeon in Dundee; and having fallen into arrear of rent, amounting to £53 : 11 : 5, as afterwards fixed by a docquetted account between the parties, Dick, in 1807,

brought a process of sequestration before the Sheriff of Forfarshire, and obtained an interdict against the removal of his effects. In this process Hogg, the advocator, lodged a bond of caution for such arrears of rent as should be found due by Low, who pleaded counter claims for ameliorations. In consequence of this caution, the Sheriff recalled the interdict against removal of Low's effects, which were sold, and the proceeds lodged in Hogg's hands, as security against the consequences of his cautionary obligation. Some further procedure took place in the process of sequestration, and also in an action raised by Dick against Hogg, as cautioner for payment of the arrears of rent, which was, however, allowed to fall asleep. In 1816, Hogg consigned in a bank in Dundee £46: 12: 9, being the proceeds of the sale of Low's effects, with interest, since the amount was put into his hands. Of this sum an arrestment was used, and a forthcoming brought against the bankers, and likewise against Hogg, by Charles Low, a creditor of James Low to the extent of £28: 3: 1. The Sheriff, after considerable litigation, decerned in the forthcoming in favour of Charles Low, and found Hogg liable in expenses. Hogg thereupon brought an advocacy on two grounds:—1. That he was entitled to be relieved of his cautionary obligation for James Low, before decree of forthcoming could be pronounced;—and, 2. That he had advanced for behoof of James Low sums to a greater amount than the £46 impressed into his hands; and this he offered to prove (so far as not instructed by written documents) by reference to James Low's oath; but he only condescended on items so advanced to the extent of £28. To this it was answered,—1. That the cautionary obligation was cut off both by the septennial prescription of cautionary obligations, and by the quinquennial prescription of rents, for payment of which Hogg became security; and a letter was further produced by Charles Low from Dick's trustee, (he having been sequestered,) bearing that he had no claim against Hogg under the cautionary obligation;—and, 2. That the counter claims were illiquid. The Lord Ordinary remitted simpliciter, and found Hogg liable in expenses, stating in a note, that he considered the plea on the cautionary obligation to be 'but a pretence, the action for that (never, so far as appears, well founded) having long been abandoned, and indeed legally extinguished by acts 1669, c. 9, and 1685, c. 14.' The Court, however, recalled his Lordship's interlocutor, 'in respect the quinquennial prescription of rents does not apply to this case, and remitted to the Lord Ordinary to receive the reference to oath offered by the petitioner (Hogg,) and hear parties thereon, and on the other points of the case, and on all questions of expenses.'

The Court were agreed that there was no room for the quinquennial prescription of rents, in consequence of the process of sequestration raised by the landlord, and the docketing of the accounts with the tenant, creating thus an acknowledgment of their being due; nor for the septennial prescription of cautionary obligations, which did not apply to judicial caution.

W. Renny, W. S.—J. GILLON, —Agents.

No. 426. J. M'TAVISH, Trustee on MATHESON'S Estate.—*A. M'Nall*.  
JAMES PEDIE, W. S.—*Brownlee*.

### Competing.

*Writer's Hypothesis—Process.*—An agent having allowed decree for expenses awarded to go out in his client's name, still entitled to appear in a suspension brought by the defender, and obtain decree for these expenses in his own name.

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PEDIE, writer to the signet, was employed by Matheson and Dr. Kennedy to conduct their defence in a suit against them as cautioners for a messenger at arms. The defence was unsuccessful, and Matheson and Dr. Kennedy were found liable in a certain sum, together with expenses of process; and an account was likewise incurred to Pedie of £18: 11: 6 $\frac{1}{2}$  for their own expenses. Matheson having advanced the whole amount for which decree had passed against him and Dr. Kennedy jointly, he employed Pedie to raise an action against the latter to recover the one-half for which he was liable. A summons was accordingly raised in Matheson's name, which concluded for one-half of the sum paid by Matheson under the joint decree against them, and also of the account incurred to Pedie in conducting their defence. The summons stated that this account also had been paid by Matheson; but Pedie in the present process averred that it had not actually been paid, although, Matheson being then solvent, he had thought it better that the action should be solely in his name, both as to his account, and the other sums paid by Matheson for Dr. Kennedy. In this action decree, with expenses, was pronounced against Dr. Kennedy; but Pedie neglected to crave to have it issued in his own name quoad the expenses, (which amounted to £14: 17: 7 $\frac{1}{2}$ ;) and it was accordingly extracted solely in the name of Matheson. A charge was then given on it to Dr. Kennedy, who brought a suspension, in which Pedie was again employed as agent by Matheson. The latter, however, having been sequestrated, and M'Tavish appointed trustee on his estate, another agent was employed, and at this time a third account had been incurred to Pedie of £3: 7: 5. The letters having been found orderly proceeded, Pedie gave in a minute in this process of suspension, craving that decree should be pronounced



in his name against Dr. Kennedy for the several sums of expenses already mentioned, viz. those incurred to him in conducting the defence in the action against Matheson and Dr. Kennedy jointly, and for which decree was obtained in Matheson's action against the Doctor, those incurred in the last mentioned action, and the expenses in the present process while he acted as Matheson's agent : or at least that, in the interlocutor finding the letters orderly proceeded, there should be a reservation of his right of preference, to the effect that the amount should not be paid by Dr. Kennedy to Matheson's trustee to form a common fund of division among the creditors, but should be paid over to him, in virtue of his right of hypothec, as the agent who had disbursed them. To this it was answered,—1. That, excepting as to the expenses in the suspension itself while Pedie was agent, the claim was incompetent in the present process;—2. That as to the expenses in the action against Matheson and Dr. Kennedy, these had been paid by Matheson;—and, 3. That as to those incurred in the action by Matheson against Dr. Kennedy, that Pedie, having neglected to take the decree in his own name, could not now interfere. The Lord Ordinary refused ' the desire of the minute for Mr. Pedie, ' reserving to him to claim for all sums of expenses, or others due ' to him, in competent form ; ' and his Lordship added in a note, ' The Lord Ordinary does not see how, in this suspension, Mr. ' Pedie can have decree in his own name for any thing but the ' expense of the suspension, in so far as agented by him ; ' but the Court altered the interlocutor, ' to the effect of finding that the ' petitioner is liable to be preferred for the sum of £14 : 17 : 7½ ' sterling, with interest thereon since the date of extract, and for ' the expense of the process of suspension at the instance of Donald ' Kennedy against John Matheson at Attadale, in so far as the ' same was agented by the petitioner ; ' and remitted to the Lord Ordinary to proceed accordingly, and to hear counsel for the parties further as to the second claim of the petitioner for the sum of £18 : 11 : 6½.

**LORD JUSTICE-CLERK.**—I entertain doubts of this interlocutor. There may be some difficulty in point of form, but Pedie has substantial justice on his side. He unfortunately neglected to get the decree for expenses against Dr. Kennedy extracted in his own name ; and if Matheson had received the money, he must just have ranked with the other creditors. But Dr. Kennedy has not paid ; he brought a suspension, and in that suspension Pedie claims ; and I apprehend that in equity he is entitled to the expenses disbursed by him, whether this be done by giving him decree in his own name, or inserting in the interlocutor a declaration of his preferable right.

**LORD ROBERTSON.**—I doubt if we can sustain Pedie's claim in this shape. A suspension is not a form of process proper for a competition, and I do not think the Lord Ordinary could do more than reserve his claim in a proper action.

**LORD GLENLEE.**—I have some difficulty as to the £18. But the £14 was expended in obtaining the very decree under suspension. When Matheson or his trustee recover this sum from Dr. Kennedy, they do so as trustee for Pedie; they must be held to charge for his behoof, and I do not see the incompetency of his asking decree in his own name in this suspension, or at least obtaining a declaration of his preference.

**LORD PITMILLY.**—Pedie's claims are certainly well founded, provided the £18 have not been paid by Matheson; but I entertain the same doubts as to the competency with my Lord Robertson, though I do not object to a reservation of his right.

**LORD ALLOWAY.**—An agent's claim for his expenses rests on two grounds:—1. The hypothec he has over the papers of the process, in virtue of which a decree cannot be taken out of his hands without payment of his account.—2. The circumstance that the fund for which decree has been obtained, has been created by his means; and on either of these grounds Pedie has a preferable claim to Matheson's trustee or creditors while the fund is outstanding; and the circumstance that the fund is so outstanding, removes any difficulty in point of form. If it had been recovered by Pedie himself, he might have retained his expenses out of it, and he is equally entitled to receive them while yet outstanding, nor has the trustee any interest to object to it.

J. MACDONELL, W. S.—J. PEDIE, W. S.—Agents.

No. 427.

JAMES KAY, Suspender.—*Cockburn—Maidment.*

Mrs. M'Laurin, Charger.—*Fullerton.*

*Parent and Child—Bastard.*—The father of a natural son who was upwards of eight years of age, having offered to take him home and instruct him in his own profession, held not liable thereafter in aliment to the mother.

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IN 1818, Kay, a plasterer, was decerned by the Sheriff of Edinburgh to pay to the charger £5 yearly of aliment for a bastard male child, of which they were the parents, till it should attain the age of seven years. When it arrived at eight years of age, the charger brought a new action before the Sheriff for continuation and increase of the aliment, to which Kay stated in defence, that he was ready to take the child home, and instruct him in the business which he himself followed. The Sheriff decerned for an increased aliment; and a charge having been given on this decree, Kay brought a suspension, on the ground that he was

not liable in it after having made the above offer, and that he was now entitled to the custody of the boy. The Lord Ordinary suspended the letters simpliciter; but the Court so far altered as to find them orderly proceeded for the aliment till the period when the suspender offered to take the boy home.

J. SOMMERVILLE jun.—J. DUMBRECK, W.S.—Agents.

ANDREW ELLIOT, Petitioner.—*Cunninghame*.

No. 428.

W. ELLIOT, Respondent.—*Bell*.

*Process*.—Question raised, but not decided, whether it is competent to reclaim against an interlocutor of the Lord Ordinary on the Bills, approving of a composition under the bankrupt act.

In this case the Lord Ordinary on the Bills, during vacation, had, in consequence of a remit from the Court, approved of a composition offered by a bankrupt under sequestration. One of the concurring creditors having reclaimed against this judgment, a doubt was stated on the Bench, whether, in consequence of the Judicature Act, it was not final, seeing it was to be held as a judgment of the Court. The note was withdrawn, and a new one presented, on the ground of *res noviter*, which was entertained by the Court.

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J. B. WATT,—Agent.

J. MERRY, Petitioner.—*Forsyth*.

No. 429.

MONKLAND CANAL COMPANY, Respondents.—*Moncreiff*.

*Process*.—*Extract*.—The Court refused a summary petition, praying for recall of an extract of a decree, on the ground that it had been issued erroneously against the party complaining.

MERRY, along with two other persons, Colt and Dixon, raised two processes of suspension and declarator against the Monkland Canal Company, in which the Court found the letters orderly proceeded, and assailed the Canal Company from the conclusions of the declarator. At an early stage of the cause Colt lodged a minute disclaiming the action, and his name was allowed to be withdrawn. Merry also ceased to make appearance, and subsequent to some of the early proceedings in the Outer House, none of the pleadings bore to be in his name, but he did not regularly withdraw from the process. On the final judgment in the Inner House, the Monkland Canal Company obtained an extract, in

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which the decerniture was expressed against Merry as well as Dixon. After an interval of six years, and the judgment as against Dixon had been reversed in the House of Lords, Merry presented a petition, praying to have the extract recalled as erroneous; but the Court unanimously refused its prayer.

The Judges were of opinion, that whatever redress might be competent to the petitioner in a reduction, they could not in this summary application interfere with the records of the Court.

*Petitioner's Authority.*—Dingwall, Dec. 1. 1825, (ante, Vol. IV. No. 195.)

D. FISHER,—W. PATRICK, W. S.—Agents.

No. 430.

W. OGILVIE, Complainer.—*Sol.-Gen. Hope.*  
J. C. SUTHERLAND, Respondent.—*Matheson.*

*Freehold Qualification—Process.*—The objector to a claim of enrolment, having withdrawn his opposition to a complaint against the judgment of the freeholders, the Court will not grant the prayer of the complaint till intimation be made to the freeholders of his withdrawing.

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THE freeholders of the county of Caithness having, on the motion of Sutherland, rejected a claim of enrolment on the part of Ogilvie, he presented a complaint, which was ordered to be served on Sutherland, the objector. Sutherland accordingly lodged answers, but afterwards withdrew his opposition, and agreed to the prayer of the complaint being granted. The Court, however, refused to do so till intimation had been made to the freeholders, to give any of them an opportunity to enter appearance; and they accordingly directed the Sheriff to summon a meeting of freeholders, and intimate that Sutherland had withdrawn his opposition. This having been done, and no appearance made for any freeholder, but a minute by the meeting produced, which bore that they were not to oppose the complaint, the Court granted its prayer, and ordained Ogilvie's name to be added to the roll.

A. MONYPENNY, W. S.—JOS. GORDON, W. S.—Agents.

No. 431.

JOSEPH GORDON, W. S., Pursuer.—*Matheson.*  
W. SINCLAIR, Defender.—*Jeffrey—G. Napier.*

*Agent and Client.*—Evidence of employment.

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THIS was an action at the instance of Mr. Gordon, writer to the signet, against Sinclair and Innes, for payment of an account of expenses incurred by him in conducting the defence of persons named Davidson, subtenants of Sutherland of Wester, tried

before the Circuit Justiciary Court at Perth, on a charge of deforcing officers in executing a removing obtained against Sutherland by Sir Benjamin Dunbar, together with certain expenses incurred in the Court of Session. The evidence founded on by Gordon in his summons was a joint letter from Sinclair and Innes, wherein they state, that 'having hitherto taken a friendly concern in the proceedings depending before the Court of Session between Sir Benjamin Dunbar and the late Alexander Sutherland of Wester, Esq.'—'we hereby become bound to see you paid any expenses which may be incurred by you in following out said proceedings, at least to the extent of £200.'—'It is, however, expressly understood that our cautionary obligation above written shall extend to Sir Benjamin Dunbar's conduct in the removal and imprisonment of John Davidson;' and adding, 'Having, therefore, the above obligation in view, you are hereby authorized to adopt such legal measures as you may find necessary to pursue, in procuring the different matters intrusted to your management, as mentioned above.' This letter was signed by Sinclair and Innes, and stated that they had authorized Mackid, a writer in Thurso, to write it. An amendment of the summons was subsequently offered with a representation, in which Gordon further founded on a letter by Mackid, bearing to be written 'by desire of Mr. Sinclair,' and enclosing a copy of the indictment served on one of the Davidsons, and requesting Mr. Gordon to procure letters of exculpation, and to employ counsel to attend the trial on their behalf. Other letters were also produced by Reid, also a writer in Thurso, who appeared to have been employed subsequently in this matter by Sinclair and Innes, confirmatory of the authority contained in Mackid's letter. Innes at once admitted his liability; but Sinclair contended that the obligation only extended to the proceedings in the Court of Session, and that there was no sufficient evidence of Mackid's having his authority for writing the letter founded on in the amendment, which he likewise maintained ought not to be received. The Lord Ordinary, however, allowed the amendment, and decerned against Sinclair; and the Court unanimously adhered.

JOS. GORDON, W. S.—G. and W. NAPIER, W. S.—Agents.

No. 432.

J. WELSH, Pursuer.—*Moncreiff—Cunninghame.*P. G. M'ARTHUR and Others, Defenders.—*D. of F. Cranston*  
—*Skene.*

*Implied Obligation—Trustee.*—Circumstances in which trustees for the creditors of an insolvent debtor were held liable for the expenses of an accountant's report in a submission to which the insolvent was the ostensible party, but in which the trustees had the real interest, and in which they had taken an active part.

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DAVID MUNN, merchant in Canada, and Robert Hunter, residing at Greenock, had been engaged in several joint adventures, under which Hunter alleged he had a claim against Munn for £6000. Munn being indebted to several other persons in this country, and particularly to the defenders, dispatched a vessel from Montreal with a cargo of timber and goods to his brother James in Greenock, for behoof of his creditors. In reference to this vessel, an agreement was entered into between James and his brother's creditors, by which the latter bound themselves not to follow separate measures for attaching the vessel and cargo, 'but to unite and follow joint measures for realizing and recovering the said freight, and the value of the said ship and cargo, and dividing the same amongst us, according to the amount of our respective debts.' It was also further agreed, that as Hunter's claim was disputed, 'a share of the free proceeds of the said subjects shall be set apart, in the proportion that £6000, the sum claimed by Mr. Hunter, shall bear to the total amount of the claims to be brought forward under these presents;' that the validity of his claim should be ascertained by a decret-arbitral, and that if he should fail in establishing it, the deposited sum should be divided among the creditors. Thereafter David Munn came to this country, and executed a trust-deed in favour of the defenders M'Arthur and others, by which he conveyed to them, for behoof of his creditors, his whole effects in Great Britain, and 'particularly all debts and sums of money indebted and owing to me by Mr. Hunter, merchant in Greenock.' A submission was then entered into by Hunter and Munn of their claims against each other, to a Mr. Bain, as sole arbiter. The submission was subscribed by these parties alone, and the pleadings for Munn were lodged in his name. It appeared, however, that the proceedings on his behalf were conducted by the agent of the defenders, acting as trustees for the creditors; that all the charges in relation to them were entered in an account, entitled 'Mr. David Munn's creditors;' and that the arbiter having remitted to the pursuer Mr.

Welsh, as an accountant, to make up a state of accounts between the parties, and some delay having taken place, the defenders wrote to the arbiter, mentioning 'the very important interest we have in the fate of the submission as heavy creditors of Mr. Munn, and the distressed state in which Mr. Munn presents himself to us at intervals, arising out of his being left without funds to contest with his late partner,' and stating, that 'we have therefore most earnestly to solicit that another week is not allowed to pass over until you issue an order to the accountant to make up a state, and report upon the books and accounts of the parties,' &c. A report having been made accordingly by the pursuer, and he having charged £160 as the expense of it, the arbiter, after pronouncing judgment on the merits, ordained 'each party, or their representatives, to pay one half' of the sum due to the pursuer. Hunter paid his half; but Munn being bankrupt, and having left the country, the pursuer claimed the other half from the defenders as trustees for Munn's creditors, and as being both the real parties, and having the principal interest in the submission. This having been resisted, he brought an action for the amount; in defence against which they maintained, that Munn and Hunter were the sole parties to the submission, and that it was to them alone that the pursuer must have looked for payment;—that the defenders were not parties to the submission, and that although they had an interest in the result of it, and had employed and paid an agent to look after it, yet this was not relevant to subject them in payment of any sum to the pursuer. The Lord Ordinary assolizied the defenders; but the Court, being satisfied that the defenders were the real parties in the submission, that they had interfered in the matter, and that Munn's name was merely employed on their account, by a majority altered, and decerned in terms of the libel.

*Pursuer's Authorities.*—*Morison*, July 11. 1809, (F. C.); *Paterson*, June 4. 1824, (ante, Vol. III. No. 71.)

J. STUART,—J. DUNLOP, W. S.—Agents.

No. 433. R. M'LACHLAN and Others, Complainers.—*Bell—Fullerton—Brown.*

W. BENNET, Respondent.—*Moncreiff—Ivory.*

*Stat. 1661, c. 24.—54. Geo. IV. c. 137.—Bankrupt—Competition.*—Held that a general adjudication under the bankrupt statute of the estates of the heir in favour of the trustee on his sequestrated estate, within three years from the death of the ancestor, constitutes complete diligence in favour of the creditors of the latter, so as to give them a preference over his estates, without the necessity of any separate adjudication.

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THE late John Crawford of Broadfield carried on business with his three eldest sons as merchants in Port-Glasgow, under the firm of John Crawford and Company. In 1811 he retired from the concern, but gave no intimation of this to the public. He died on the 3d of August 1813, leaving heritable property to a considerable extent, and debts due by him individually to the amount of £25,000, and as a partner of the company to that of £20,000. By a trust-deed of settlement he conveyed his property generally to his widow and three eldest sons as trustees for payment of his debts, and to divide the residue among his family in certain proportions, subject to the liferent of his widow. There was, however, no special conveyance of his heritable property, and he inserted a clause in these terms:—‘To all my real estates I direct my heir at law to make up titles at the expense of him and his brothers, and to convey to them and their issues the several portions thereof so to be made choice of by and for them, subject always, however, to their mother’s said liferent.’ His eldest son James made up titles to certain special subjects by precepts of clare constat; but he was never served heir, either in general or special, to his father; and to the greater part of the heritable property no title was ever completed by him.

On the 1st of February 1816 the estates both of John Crawford and Company, and of James Crawford as an individual, were sequestrated; and on the 5th of March thereafter Bennet was confirmed trustee, and the usual decree of adjudication in general terms was pronounced in his favour. On this taking place, M'Lachlan and others, creditors of the late John Crawford, proceeded to constitute their debts against James as his father’s heir; but they did not make Bennet a party to these actions. Having obtained decrees of constitution, the creditors assigned them, with their grounds of debt, to M'Lachlan in trust, in order to lead an adjudication for their common behoof, so as to secure their preference over the father’s estates. A process of judi-



cation was accordingly raised, in which decree was obtained on the 3d of July 1816, reserving all objections contra executionem, so far as regarded the property to which James had made up titles, and this was followed by a charge against superiors, which was recorded on the 2d of August of that year.

In regard to that part of the property to which James had not made up titles, an adjudication contra hæreditatem jacentem was raised before the Sheriff. The validity of this being, however, considered doubtful, a process of adjudication was brought in the Court of Session, where it was called on the 5th of July 1816, but, being taken out to see by Bennet as trustee, no decret was obtained within three years from John Crawford's death.

A claim having been lodged by M'Lachlan with Bennet, demanding a preference over the estates which had belonged to John Crawford, Bennet repelled the claim of preference. M'Lachlan then presented a petition to the Court, in which he contended that he had right to the preference,—1. Because the general adjudication in favour of Bennet constituted complete diligence within the three years from the death of John Crawford, and had the effect to create in favour of his creditors a preference over his estates. In support of this, he maintained that James Crawford, as apparent heir of his father, had acquired right to his estates, and so had become liable for his debts; that the creditors of his father were thus the creditors of James; that any act done by the trustee for behoof of the creditors of James must be available to them, seeing that they were creditors not only of the father, but also of James; that the general adjudication in favour of Bennet was therefore equally as effectual to them as if it had been an adjudication at their own instance; that by the bankrupt act it was declared, that no other adjudication should be competent after that general adjudication, so that they could not thereafter lead an effectual adjudication, and, consequently, it must be held as an adjudication in their favour, and as such complete diligence; and that, such being the case, they were entitled, by virtue of the statute 1661, c. 24, to a preference.—2. Because, at all events, and supposing the above plea not well founded, the decree of adjudication obtained on the 3d July had been pronounced within the three years; and that, as the trustee had, by his own act, prevented decree being got in the other process of adjudication, he was barred from objecting to it. To this it was answered,—1. That the general adjudication in favour of the trustee was unavailing to attach any property whatever, and that, in order to this, a special adjudication was requisite; that it was obtained by Bennet, not as trustee for the creditors of John Craw-

ford, but for those of James, and therefore could not be effectual to the former ; and that it was impossible to maintain that it was the intention of the Legislature, in passing the bankrupt act for the equal division of the funds of the bankrupt, to make a provision so inconsistent with that object, as to declare that the general adjudication should have the effect to rear up a preference in favour of one set of creditors over another ;—and, 2. That the adjudications which had been attempted to be obtained by M'Lachlan were inept, seeing that the process of constitution had been raised against the bankrupt without calling the trustee ; and that, so far as regarded the second adjudication, it could have no effect, as decree had not been obtained within the three years, and the trustee was entitled to take it out to see, and therefore could not be barred from objecting that it was incomplete. Lord Eldin found ‘ the general adjudication at the instance of the trustee ‘ sufficient to vest the creditors of John Crawford in the subjects ‘ therein contained, according to their respective rights, without ‘ the necessity of any further proceeding, so as to entitle them to ‘ their preferences as creditors who had done sufficient diligence ‘ within three years of the death of the said John Crawford ;—and ‘ separatim, that the adjudications at the instance of John Crawford’s creditors, brought into the Court of Session in the month ‘ of July 1816, are sufficient to establish preferences in their favour as creditors of the said John Crawford, who had done diligence within three years after his death, and in respect the ‘ trustee interrupted the course of the said adjudications, whereby ‘ the creditors were prevented from following out their diligences, ‘ and completing them within the three years ; and therefore sustained the said adjudications, and repelled the objections of the ‘ trustee, but found that the adjudications conducted before the ‘ Inferior Courts were inept and inhabile, and sustained the objections of the trustee against these adjudications.’ Bennet having represented, Lord Medwyn recalled the interlocutor, and reported the case to the Court, accompanied with a note, in which he expressed an opinion that the general adjudication by the trustee was not available as complete diligence to the creditors of John Crawford ; that the decree of adjudication obtained on the 8d July 1816 was effectual as diligence against part of the property so far as it went ; but that the second adjudication, in which no decree had ever been got, was unavailing to them, and the trustee had done nothing to prevent him from objecting to it. The Court, on advising informations, found ‘ the general adjudication in favour of the trustee sufficient, without further proceedings at the instance of the creditors of John Crawford, to ‘ entitle those creditors, according to their respective rights and

'interests, to their preferences under the act 1661, as creditors who had done diligence within three years after the death of John Crawford; and appointed the trustees to alter the scheme of ranking complained of, and to rank and prefer the creditors of the said John Crawford in terms of the above finding.'

**LORD BALGHEY.**—The case is not unattended with difficulty; and I will state where my doubts lie. The whole uncertainty, if I mistake not, arises from the vague terms in which the bankrupt act has been expressed. Had that act given a general right to all the creditors of the ancestor to rank under the heir's sequestration, I do not see where any doubt could be, and there would have been nothing but the greatest propriety and expediency in preventing, by means of such a regulation, the funds from being carried away by the diligence of creditors. But the way in which this act has been framed leaves it very doubtful whether the ancestor's debts were meant to be taken up in this manner. Previous to the act 1661, the ancestor's creditors had no preference in a competition with the creditors of the heir. But that act operated what in the Roman law is called a *separatio* betwixt the estate of the ancestor and that of the heir; and upon that principle, accordingly, it declares that the creditors of the ancestor shall be entitled to secure a preference by diligence; but it gives nothing more than a mere privilege to this effect,—a privilege by which every creditor of the ancestor, who chooses to take the necessary steps of diligence within the three years, may make good his preference. This, however, he can do only by taking certain steps; and so completely was this of the nature of a privilege, that even a minor was not indulged beyond the period of three years in taking the necessary steps. The act 1661, however, does not say expressly that the ancestor's creditor must do 'complete diligence.' This is nowhere required by the terms of the act. But the cases that have been since decided seem to establish the necessity of doing complete diligence. Lord Stair requires *infestment*, or such a perfect and complete diligence as lays hold of the subject, and places it fairly in *bonis* of the creditor. Such has always from that period been the understood principle of the law. See, in particular, Lord Kilfergan's *notandum* on the case of Ballenden, reported by Harcarse.

Such, then, being the law of Scotland prior to the bankrupt act, the question is, Are you, under the provisions of that statute, (which supersedes the separate diligence of the bankrupt's creditors,) to allow the ancestor's creditors a preference, without having done complete diligence? Is the general clause of the bankrupt statute, expressed as it is, to unhinge all the former principles of the law, as established by practice and by decisions? If this be the effect of the bankrupt act, you cannot single out any particular set of creditors who are to take advantage from the clause more than any

other ; for if the sequestration of the trustee has the power of constituting a preference to the creditor who has merely begun diligence, it must have the same effect as to all the ancestor's creditors without distinction, whether they have done any separate diligence or not. But I apprehend that this would be carrying the effect of the bankrupt act a great deal too far.

If I am at all able to interpret the expressions of the bankrupt act, it means to leave the act 1661 untouched. No doubt, if the act 1661 had given a general preference to the ancestor's creditors, whether they had done complete diligence or not, much might have been said in favour of the argument that that preference was specially secured by the trustee's adjudication. But the act 1661 did not give that preference. It merely conferred the privilege of acquiring a preference by adopting measures for that purpose ; and I think it would be too much to suppose that the established law in the matter can be overturned by the uncertain expressions of the bankrupt act.

**LORD GILLIES.**—I think the question is one of no difficulty. I hold it to be a sound principle, and one which is applicable in this instance, that a prior law must be controlled and explained by a posterior one. The act 1661 does not require that the creditor's diligence should be complete. It has received an interpretation to that effect only on the strength of two decisions ; but I think the interpretation very questionable. At any rate, if there could be a question on this point, it was put an end to by the bankrupt act. It is impossible to overlook one consequence of the trustee's argument. Instead of saving the act 1661, as the bankrupt act professed to do, that argument would have the effect of rendering the act completely nugatory. If, under the act 1661, the creditors were required to do complete diligence against the ancestor's estate, it was just as necessary that the creditors of the heir should do complete diligence against the heir. Complete diligence was not less necessary on the one side than the other. But the fact is, that the bankrupt act has dispensed with it, both on the part of the heir's creditors, and on the part of the ancestor's. The necessity of such diligence in both cases is done away with. Every separate adjudication by the creditors, after the date of the sequestration, is declared nugatory. If a special adjudication by the trustee was necessary to secure the preference of the ancestor's creditors, and if the trustee neglect to pursue that special adjudication, is it fair that the ancestor's creditors, who were required by the act to resign themselves to the management of the trustee, should suffer by the omission ? On the whole, I think the bankrupt act ought to be the governing rule in this case.

**LORD CRAIGIE.**—I am of the same opinion with Lord Gillies. We must give effect to the trustee's diligence, 1. as diligence against the estate of the ancestor ; and, 2. as against the estate of the

heir. The case in *Harcarse* is decisive as to the meaning of complete diligence.

**LORD PRESIDENT.**—I would have had no doubts on this case if there had not been a difference of opinion on the Bench. If there had been no sequestration, then indeed there would have been a necessity for complete diligence being done by all the creditors of the ancestor; and any one of those who did not complete his diligence in due time would have been cut out. But the question is quite different when a sequestration has taken place under the bankrupt act. That statute, in dispensing with all separate diligence, and introducing a certain equality among creditors, still kept up all former preferences. One great object also of the bankrupt act was to save the fund from the expenses of a great variety of diligence, and there can be no doubt that one general adjudication was meant to serve for the creditors both of the heir and of the ancestor. If it were otherwise,—if the ancestor's creditors could not support their preference without each leading separate adjudications,—the consequence would be most injurious to the creditors of the heir, by the numerous and expensive adjudications which might be led. I am therefore of opinion that the adjudication by the trustee is available to the creditors of the ancestor, so as to secure to them their preference.

*Petitioners' Authorities.*—(1.)—1. Bell, 9. 18; 2. Bell, 157. 430; 54. Geo. III. c. 137. § 29. 30. 31. 42.—(2.)—*Grahame*, Nov. 27. 1751, (12160); 1. Bell, 627; Ballenden, March 1885, (3127.)

*Respondents' Authorities.*—(1.)—2. Bell, 433; 1. Bell, 680; 54. Geo. III. c. 137. § 29.—(2.)—1. Bell, 630; 2. Ersk. 8. 101; Peadie, Dec. 13. 1776, (No. 2. Ap. Process); 2. Bell, 443; 1. Bell, 648; 2. Bell, 460; Clark, May 20. 1815, (F. C.); Barbour, Nov. 21. 1811, (F. C.); Galloway, Nov. 26. 1822, (ante, Vol. II. No. 42.)

**J. W. JOLLIE, W. S.—W. RENNY, W. S.—GIBSON-CRAIGS and  
WARDLAW, W. S.—Agents.**

**H. ANDERSON, Pursuer.—*Skene—Watson.*  
ABRAHAM NEILSON, Defender.—*Moncreiff—Miller.***

**No. 434.**

*Stat. 1621, c. 18.—Bankrupt.*—Circumstances under which a feu-disposition of an area of ground acquired by the son of a bankrupt from the proprietor, as to which the father had formerly been on terms for a purchase, and who consented to the sale to his son, was held not reducible under the above statute.

IN 1819 George Neilson, the father of the defender, made an offer by a missive to John Brown for a feu-right of an area of ground in Edinburgh. It did not appear that there had been any written acceptance of this offer by Brown, but Neilson proceeded to pull down an old house on the property, to dig a foundation, and to erect a small retaining wall, when he was interrupted by an interdict at the instance of his brother John, who alleged he

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had a servitude over the property, and that an encroachment had been made on an area belonging to him. Nothing farther was done to the property by George; and in October 1822, his son Abraham made an offer to Brown for the property at a feu-duty of £15, and subject to the conditions usually inserted by Brown in his feu-rights. This was accepted in writing by Brown; and in consequence of this agreement, Abraham proceeded to build on the ground, and on the 3d of March 1823 obtained a feu-disposition from Brown. In the meanwhile his father's estates were sequestrated on the 26th of February of that year; and Anderson having been appointed trustee, brought an action against Abraham Neilson founding on the statute 1621, c. 18, and concluding to have the disposition set aside, and the property found to belong to him as trustee on his father's estate. Lord Eldin, after ordering a condescendence and answers, allowed a proof of an averment by Abraham Neilson, 'that the feu-right in question was acquired by him on his own proper account for payment of the reddendo stipulated in the feu-contract and relative missives between him and Mr. Brown the superior; and that the buildings on the subject in dispute were erected thereon with his own funds, and with funds advanced to him by his uncle, John Neilson, and other relations; and that the pursuer's author, George Neilson, the bankrupt, did not contribute, directly or indirectly, any part of the expense.' A proof was accordingly taken, and Lord Medwyn, on advising it, found 'that the defender has fully established all the facts offered to be proved by him which Lord Eldin called upon him to establish; and that, in allowing this proof, his Lordship plainly implied that these facts, if proved, would be sufficient to elide the reduction on the act 1621, and therefore assolvied the defender.' At the same time he issued a note, in which he stated that he entertains some doubts how far the transfer of the feu-right to a conjunct and confident person, at a time when it is not disputed the father was insolvent, without any consideration of any kind, can take the transaction from the operation of the act 1621, on the ground that the defender has proved that the feu-duty was, in the opinion of the two witnesses, the adequate consideration for the property in 1822. The preparation which had been made for building, and even the small portion of retaining wall previously built, should have been worth something, so that, if the area, under burden of the feu-duty, had been exposed to sale, it probably would have brought something.' On advising a representation, with answers, his Lordship altered, and found 'that the conveyance by the superior, in favour of the defender Abraham Neilson, of the feu which had formerly belonged to George Neilson, with his concurrence and instrumentality, was

' an indirect alienation to a conjunct person of a part of the bankrupt's property, without any price really paid, and as such is liable to reduction at the instance of the trustee for his creditors ;' and therefore reduced in terms of the libel. Abraham Neilson then reclaimed, and contended, that although an offer had been made by his father for the area, yet it had never been conveyed to him, and never became his property ; that as no price had been paid by him, his estate could not possibly have been diminished by the subsequent transaction between Brown and the defender ; that the right to the area was not derived from his father, but from Brown for onerous causes ; and that although his father had concurred, to the effect of passing from any claim which he might have had under the prior transaction, yet this could not bring the case within the statute 1621. The Court unanimously altered, and assolized the defender, with expenses.

ANDERSON and WHITEHEAD, W. S.—W. HUNT, W. S.—Agents.

R. MONTGOMERY, Advocate.—*Cockburn*—D. M'Farlane.

No. 435.

A. and J. CRAIG, Respondents.—*Jameson*.

*Reparation*.—Circumstances in which the owners of a vessel lying aground having been injured by the collision of another vessel passing her, were held not entitled to reparation of the damage thereby occasioned.

CRAIGS, owners of the sloop *Jeanies*, raised an action before the Water Bailie of the Clyde, for recovery of damage occasioned by the brig *Mary*, belonging to Montgomery, having come into collision with her. A proof was allowed in the Inferior Court, from which the facts appeared to have been as follows :—Early on the morning of the 13th of October 1821, at which time the moon was up and at full, but obscured by a dense fog, the sloop *Jeanies*, belonging to Craigs, left the Broomielaw of Glasgow for the purpose of being tracked down the river Clyde with the ebb tide. She was followed at a short distance by the brig *Mary*, which was likewise tracked down the river. The tracking path is on the south bank of the river, and the horses of the *Jeanies* were conducted by one man, with a young lad as assistant. About six miles down the river, (day not having yet broke,) the *Jeanies* ran aground on a bank nearer the south than the north shore, but with sufficient room and depth of channel for a vessel to pass on the south, which is the usual side for tracking vessels to pass when there is sufficient water, although the north channel is deeper. By a regulation of the Parliamentary trustees for the river Clyde it is provided, ' That all

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Lord Cringletie.

F.

'vessels whatever lying at anchor or aground in the river and frith of Clyde shall, when it is dark, have lights hung out at a part of the vessel nearest the deep water, under a penalty of five pounds.' The master of the Jeanies, however, did not hang out a light when she ran aground, which, her pilot deponed, might have been of use, and would have shone through the fog. There was, however, a clear fire burning in the camboose, or grate for cooking victuals, on the deck of the vessel, but which, it appeared, could not be seen from a vessel astern. The people on board the Jeanies were aware that the Mary was coming down behind them, and they heard the trackers calling to their horses for some time before the vessel became visible, which was about ten minutes or a quarter of an hour after the Jeanies ran aground. They did not, however, send back their own tracker or his assistant to inform the Mary of their being aground; but so soon as she came in sight, being then, according to some of the witnesses, about 30 or 40, and according to others about 200 yards distant, they called out to the Mary that they were aground, and directed her to take the north channel. It did not appear whether these directions were heard by the people on board the Mary, as, before the proof was taken in the Inferior Court, she and her crew had been lost at sea, and the evidence of the pilot who had been on board when the accident happened was refused by the Water Bailie, on the ground that he had been called as a defender in the action by the owners of the Jeanies. Immediately on the people on board the Mary being made aware that the Jeanies was aground, which was done chiefly by a call from the Jeanies' tracker to theirs, and by him to the vessel, the master gave orders to the tracker to drive his horses in a direction so as to check her way, and to draw her close to the tracking bank, in order to enable her to pass the Jeanies on the south side. This was instantly done, but the Mary having considerable way, in about three minutes came up with the Jeanies, and not completely clearing her, (though she immediately afterwards passed by the same side,) struck her on the larboard quarter, whereby damage was occasioned to the Jeanies which cost £16. 8s. to repair. For recovery of this sum and demurrage, Craigs, the owners of the Jeanies, raised an action before the Water Bailie of the Clyde, who found, 'That the regulation by the trustees, which requires vessels lying aground in the river to have lights hung out when it is dark, is clearly in force; but that it is not established, that on the occasion libelled a light on board the pursuers' vessel, in addition to the fire which was burning on the deck, would have been of



‘much use, or would have prevented the collision of the vessels ;  
‘and that the want of such a light is not relevant to preclude the  
‘pursuers’ claim of damages, or to liberate the defender from the  
‘consequences of his vessel having struck the pursuers’ vessel  
‘when lying aground, in respect it appears from the evidence  
‘adduced, that, in the actual circumstances of the case, the collision might have been avoided by due care and ordinary skilful  
‘management on the part of the crew of the defender’s vessel ;’  
and he accordingly decerned against Montgomery for the amount of repairs, and for demurrage for six days, at the rate of two guineas a day. Of this judgment Montgomery brought an advocacy, in which the Lord Ordinary altered the Water Bailie’s interlocutor, assoilzied Montgomery, and found him entitled to expenses ; and the Court adhered.

**LORD GLENLEE.**—On the whole matter, I incline to think that the Lord Ordinary is right. The omission to take those precautions most fitted to prevent accident attaches the blame to the *Jeanies*. The regulation as to lights applies to all vessels aground. Its object is not to illuminate, but to give information that a vessel is aground or at anchor, and to show on which side is the deep water for other vessels to pass ; and this precaution would have given notice of the *Jeanies* being aground, and on which side the *Mary* should pass, sooner than any thing else. The *Mary* knew that the *Jeanies* was before her, but did not know that she was aground. On the other hand, the *Jeanies* knew that the *Mary* was coming down on them, but all they did was to make a call from the driver of their horses to the driver of the *Mary*’s ; and there is no evidence that the directions to go to the north reached the *Mary*. All we see is, that so soon as the *Mary* heard of the *Jeanies* being aground, orders were given to take the horses in a direction so as to pass by the south side, which is clearly proved to be the proper side, if no signal to the contrary be given. The accident did not happen from any want of room on that side ; and there is no ground to think that it would have been avoided by attempting the north channel. On the contrary, the *Mary* would have been more likely to strike the other vessel, because, as the tide was ebbing, a force to give her way greater than the tide was absolutely necessary to enable her to obey the helm, while she would be deprived of such additional force by the necessity of slipping the towing rope, in order to go by the north of the *Jeanies* ; and, for any thing that appears on the proof, if she had attempted this, she would have gone right down on her. On the other hand, on the south side she had the advantage of the horses to draw her towards the shore. The attempt, however, by the crew of the *Mary* was too late, but

this was entirely owing to the lateness of their being made aware that the Jeanies was aground, and I do not see that any blame is attachable to them; the loss must consequently be borne by the owners of the Jeanies alone.

LORDS JUSTICE-CLERK, ROBERTSON, and PITMILLY, concurred.

LORD ALLOWAY was of opinion that there was blame on both sides, and that the loss ought therefore to be laid equally on both parties.

T. JOHNSTONE,—CAMPBELL and M'DOWALL,—Agents.

No. 436.

WILLIAM JEFFREY, Pursuer.—*Skene—Hogg.*

THOMAS AIKEN, Defender.—*Jeffrey—Christison.*

*Sale—Heritable Creditor.*—Held that a sale made by an heritable creditor under a power of sale, and who acted as auctioneer, and caused the subjects to be bought for his own behoof, was unlawful.

June 16. 1826.

1st DIVISION.  
Lord Medwyn.

H.

ON the 26th of June 1811, Jeffrey, who was proprietor of certain heritable subjects in the town of Falkirk, granted a bond and disposition in security over them in favour of Thomas Aiken, a messenger and auctioneer, in consideration of the loan of £150 sterling. In the deed there was a stipulation, that if Jeffrey 'shall fail to make payment of the sum that shall be due by the 'personal obligation before written against the said term of Martinmas next, then and in that case it shall be lawful to and in 'the power of the said Thomas Aiken and his foresaids to sell 'and dispose of the foresaid subjects, or any part thereof, they always not only giving me and my foresaids at least three months 'previous intimation personally, or at our dwelling-place, that such 'is their intention, but they shall also be obliged to cause advertisements of the sale be insert three times in the Edinburgh 'Evening Courant and Advertiser for at least two months before 'the time of the sale, and that by public roup, at Falkirk, to the 'highest bidder, and upon payment of the price or prices to be 'given therefor, to hold count and reckoning, and make payment 'to me and my foresaids of the balance thereof, after deduction of 'the foresaid principal sum, annual rent that shall be due thereupon, and penalty that shall have been incurred, and all expenses,' &c. Aiken was accordingly infest; and Jeffrey having become insolvent, and failed to pay the price at the stipulated period, the subjects were advertised for public sale in terms of the clause. They were accordingly exposed for sale at Falkirk on the 30th July 1812, on which occasion Aiken officiated as the auctioneer. After several offers, a person of the name of Taylor was preferred, who, it was admitted, had been employed by

Aiken as his agent, and the subjects were disposed by Aiken to Taylor, and by him to Aiken, who thenceforward possessed them as absolute proprietor. At the distance of twelve years thereafter Jeffrey brought an action against Aiken, concluding for reduction of the sale and count and reckoning. In support of this he maintained,—1. That as the holder of a bond and disposition in security is in a situation analogous to that of a trustee, seeing that he acts not only for his own behoof, but for any other creditors who may be interested, and for the debtor, he cannot legally purchase the property over which he has the power of sale.—2. That as a bona fide sale was required in order to found a valid disposition, no such sale had here taken place, as the buyer and seller were one and the same, which was inconsistent with the character of a sale;—and, 3. That, at all events, where the holder of a power to sell adds to the capacity of seller that of auctioneer and purchaser, the sale must be held collusive and illegal. To this it was answered,—1. That Aiken had full authority, by virtue of the power of sale, to dispose of the subjects; and that the sale which was made was a fair public sale for a full price, and as to which there was no allegation of fraud.—2. That a creditor with a power of sale is not vested with any trust, and has no opportunity of better knowledge of the property than the rest of the world, and the debtor, who has an opposing interest, is made a party to the sale by the intimation;—and, 3. That even although the sale were irregular, yet it was not competent to challenge it after the lapse of twelve years. The Lord Ordinary reported the case, accompanied by this note:—‘The Lord Ordinary is not aware of any case of reduction on grounds similar to the present; and as bonds and dispositions in security, with a power of sale, are become such a common species of security, he has thought it better to bring the case at once before the Inner House for decision. So far as he can see, it is impossible to hold that the seller can also be the buyer of a subject, after the judgment of the House of Lords in the case of the York Buildings Company against Mackenzie, 19th May 1795, and cannot help considering the case of such sales as the present as affording much stronger grounds for reduction than a sale carried on under the sanction and superintendence of a Court. The creditor under such a bond has the power of fixing the time and conditions of the sale, and particularly the upset price, without any control from judicial authority, and his conduct in this respect could only be checked if he was acting manifestly in a fraudulent manner. The interest as seller and buyer is directly opposite, and seemingly incompatible. Indeed, the power of

' sale by a creditor of his debtor's effects, sine auctore prætoris, seems to be very questionable both in law and expediency. That there has been acquiescence for twelve years seems not sufficient to exclude the right of reduction. In Mackenzie's case the reduction was not raised till 1790, and the sale had been in 1779, and a practice of common agents offering at such sales, and in some instances becoming purchasers, was disregarded.' The Court decerned in the reduction, but remitted to the Lord Ordinary to hear parties on a claim by the defender for meliorations.

Some of their Lordships proceeded on the circumstance that the defender had officiated as auctioneer, and that it did not appear there had been any judge of the roup, while others rested on the general grounds expressed in the note of the Lord Ordinary.

*Pursuer's Authorities.*—(1.)—Wilson, June 26. 1789, (16376) ; Crawford, March 4. 1767, (16208) ; M'Kellar, March 8. 1817, (F. C.) ; York Buildings Company, (8 Brown's Rep. 42) ; L. Vesey, 9 ; 1. Eq. Ab. 471 ; Murray, June 16. 1710, (9314) ; Corsane, January 15. 1736, (16208) ; 4. Brown's Rep. 259.

*Defender's Authorities.*—(1.)—Maxwell, January 21. 1822, (ante, Vol. II. No. 128.) —(3.)—1. Montague, 294 ; 2. Bell, 408 ; Sugden on Sale, 586 ; 11. Vesey, 226 ; 5. Vesey, 781.

J. SMAIL,—W. Renny, W. S.—Agents.

No. 437.

JAMES KEILLER, Claimant.—*J. Henderson jun.*  
THOMSON'S TRUSTEES, Respondents.—*Baird.*

*Testament—Legacy.*—Circumstances in which a party was found entitled to a legacy, although his christian name was different from that expressed in the testament, the Court being satisfied that he was the party intended.

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1st Division.

Lord Meadowbank.

H.

THIS was a branch of the case noticed ante, Vol. III. No. 287. The late Alexander Thomson left a testament, by which he bequeathed various legacies to different persons, and among others ' to William Keiller, confectioner in Dundee, the like sum of £200 sterling.' The residue of his funds was to be enjoyed by the trustees. A claim having been made for this legacy by William Keiller, confectioner in Montrose, and by James Keiller, confectioner in Dundee, the trustees brought a multiplepinding. It appeared that there was no such person as William Keiller, confectioner in Dundee; that James Keiller was the only confectioner there of that name; that although William Keiller had been for some time employed in the shop of James, yet he had never been a confectioner till within a few months before Thomson's death, and he then established himself in Montrose. It also ap-

peared that James Keiller had been in habits of intimacy with Thomson, and was a relation, and that Thomson, who was far advanced in life, was apt to commit blunders in names, as had been found in the other branch of this case above alluded to. In relation to a claim which had been lodged by William Keiller, the Lord Ordinary found, 'that at the date of the settlement of Alexander Thomson deceased, as well as at the time of his death, the claimant William Keiller is admitted to have been a confectioner in Montrose, having left his employment in Dundee nearly twelve months before, while the legacy in question was expressly bequeathed to William Keiller, confectioner in Dundee; that the circumstances averred are not sufficient to instruct that if erroneously designed, the person described by the said testator as William Keiller, confectioner in Dundee, was in truth the claimant, a confectioner in Montrose;' and therefore dismissed his claim. At this time James had not put in a claim, but on this judgment being pronounced he lodged one, and William Keiller having represented, the Lord Ordinary reported the case on informations to the Court. William Keiller, however, retired from the competition, and did not lodge an information; and the Court thereupon sustained the claim for James Keiller, and preferred him accordingly.

*Claimant's Authorities.*—Keiller, Dec. 15. 1824, (ante, Vol. III. No. 287); 2 Ersk. 9. 8.

RAMSAY and IMRIE,—J. ORR,—BROWN and LAWSON,—Agents.

Mrs. MOIR and HUSBAND, Pursuers.—*D. of F. Cranstoun*— No. 438.  
*Rutherford.*

Mrs. MUDIE and HUSBAND, and Others, Defenders.—*Jeffrey*—  
*Jameson.*

*Bona Fides.*—Circumstances in which possession under a deathbed deed, pending a reduction of the deed, held to have been in bona fide until the affirmance of the decree of reduction in the House of Lords.

THE late Mr. Aitken of North Tarry, by a deed of settlement executed in 1813, when he was in his 89th year, conveyed all his property, heritable and moveable, with the exception of a small piece of ground intended for the use of his successors in the incumbency of the pariah of St. Vigeans, to his nieces, Mrs. Mudie and Mrs. Ford, equally between them, excluding their sister Mrs. Moir, who was merely provided in an annuity of £120, exclusive of the *jus mariti* of her husband. The deed was burdened with this annuity and the payment of certain legacies, and it contained

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2d Division.  
Lord Mackenzie.  
M'K.

a reservation of a power to revoke even on deathbed. In April 1816, in consequence of the bankruptcy of Mrs. Ford's husband, Mr. Aitken executed a new deed, whereby he settled, as by the former deed, his whole heritable and moveable estates, in equal shares, on Mrs. Mudie and Mrs. Ford, but conveyed the share of the latter to certain persons as trustees for her behoof, excluding the *jus mariti* of her husband, and revoked all former dispositions and settlements. Mr. Aitken was on deathbed when he executed this deed, which contained exactly the same legacies and provisions with the former settlement in 1813; but it differed from it in these respects:—It contained no exception of the piece of ground reserved in the first deed to the incumbents in the parish of St. Vigens;—it conveyed Mrs. Ford's share to trustees instead of to herself, as in the prior deed;—it made an alteration in one of the trustees nominated for the management of the annuity and provisions to Mrs. Moir and her children;—it declared Mrs. Mudie and Mrs. Ford's trustees liable each for one-half only of the legacies and annuities, while the former deed declared the two sisters liable *singulis in solidum*;—and it enlarged the powers of division and sale granted to his disponees. Mr. Aitken died six days after the execution of this settlement, when the defenders entered into possession of the property, and in about a year thereafter Mrs. Moir brought a reduction of the deed 1816 *ex capite lecti*, in so far as it conveyed away his heritable property to her prejudice as one of his heirs portioners, and concluding for payment of her share of the rents falling due since Mr. Aitken's death. Against this action it was pleaded in defence by Mrs. Mudie and Mrs. Ford's trustees, That the pursuer's interest to challenge was cut off by the prior deed, which settled the testator's property on the very same persons, in the precise same proportions, and under precisely the same burdens, as the deed sought to be reduced, with this difference only as to Mrs. Ford, that her share was given her through the medium of trustees, and without any alteration whatever as to Mrs. Mudie's interest; and consequently that there was no intention to make any revocation of the former settlement, notwithstanding the general revocation of all prior settlements in the deathbed deed. The Lord Ordinary (Lord Pitmilley) having repelled these defences, and decreed in the reduction, the cause was taken by petition to the Inner House, when their Lordships, after a hearing in presence, being equally divided in opinion, called in Lord Cringletie as the Ordinary in course, who concurred with the interlocutor of the Lord Ordinary, which was accordingly adhered to, (March 2. 1820.) This judgment was affirmed on appeal, but without

costs, (March 1. 1824,) when the Lord Chancellor observed,—  
 ‘It has been strongly contended at the bar, that although there  
 ‘are express words of revocation in this deed, it ought not to  
 ‘operate as a revocation, because there had been a former deed,  
 ‘and that it was an affirmance of that deed. Now, in truth, in  
 ‘respect of that, there is hardly a single interest given in the  
 ‘former deed which is not somehow in its nature and quality al-  
 ‘tered by this. It does therefore appear to me, that whatever  
 ‘might be the law,—in respect of which I beg I may be under-  
 ‘stood to give no opinion whatever,—if the dispositions had been  
 ‘exactly the same, they do not apply to this case; and, therefore,  
 ‘however much I may regret the hardship of the case, it appears  
 ‘to me that your Lordships can give no judgment but that of  
 ‘affirmance of this judgment.’ The cause having returned to  
 this Court, the judgment of affirmance was applied, and a remit  
 made to the Lord Ordinary to proceed as to the conclusion for  
 rents, against which the defenders pleaded *bonâ fide* consumption.  
 The Lord Ordinary sustained this plea, and found the defenders  
 liable to account to Mrs. Moir for her share of the rents only  
 from the date of the judgment of affirmance by the House of  
 Lords; and the Court, by a majority, adhered.

**LORD ROBERTSON.**—When a person possesses *titulo oneroso*, every  
 presumption is in his favour; but it is different when he possesses  
*titulo lucrativo*; and not only did the parties here possess *titulo*  
*lucrativo*, but under a title which called on them particularly to  
 consider the grounds of it, as disappointing one of the heirs at law.  
 The defence against the action of reduction was, that the prior  
 deed was almost the same with that executed on deathbed; but  
 this defence was repelled by the Lord Ordinary, who reduced the  
 deed: The Court adhered, and the House of Lords affirmed;  
 and the Lord Chancellor’s opinion is decisive against the plea of  
*bona fides*, as he observes that every interest was altered by the  
 new deed. These parties, therefore, possessing by a lucrative  
 title, under a deed executed on deathbed, and which cut out the  
 natural heir, were bound to examine their right most scrupulously;  
 and as they were never left one moment to suppose that the deed  
 was not to be challenged, I am of opinion that their plea of *bona*  
*fides* ought not to be sustained.

**LORD PITMILLY.**—My opinion concurs with that of the Lord Ordi-  
 nary. Our later decisions, particularly that in the Queensberry  
 cases, are much more favourable to the plea of *bona fides* than  
 formerly. This, however, is a difficult case; but a distinction  
 must be taken as to whether the cause depends on points of fact or

points of law, which latter the parties cannot be aware of; and here I do not think we can infer a *conscientia rei alienæ* till after the judgment of the House of Lords.

**LORD ALLOWAY.**—I entertain doubts of this interlocutor, unless it is to be held as a principle, that wherever there is possession, *bona fides* must continue till a final judgment of the House of Lords. It is true that this deed was a good title of possession till challenged by the heir at law, who alone could do so; the defenders were therefore entitled to enter into possession, and their *bona fides* was certainly not disturbed till the action was raised, about a year after. Having thus commenced their possession *bonâ fide*, I am inclined to hold that it did not cease till the decision in the Inner House; but I hesitate very much to find that it still continued after that, notwithstanding the judgment of the Lord Ordinary and the Court. And as to Mrs. Ford's share, which was conveyed to trustees who were lawyers, I can scarcely believe that they have paid over the rents pending the appeal.

**LORD JUSTICE-CLERK.**—Looking back to the circumstances of this case, I have formed an opinion similar to that of the Lord Ordinary. Although my opinion in the reduction was always in favour of the pursuer, it was a very peculiar and difficult case. The Court ordered a hearing in presence, and were equally divided; and though our judgment was affirmed, no costs were given. Nor is there any thing in the Lord Chancellor's speech indicative of an opinion that it was not a difficult case, or that it was ruled by the prior case of Crawfordland.

**LORD GLENLEE.**—I cannot say but that I have had some doubts as to this case, though I concur with the opinion which has just been delivered. If the question as to the reduction had been treated in the House of Lords as one of no doubt or difficulty at all, and quite settled, merely because there were revoking words in the deathbed deed, without any further consideration, I would not have been inclined to extend the period of *bona fides* beyond the date of the judgment of this Court. But the very reverse of this appears from the speech of the Lord Chancellor, who considers it still an open question, if the deathbed and the prior deeds were one and the same, and who makes the case to depend on whether there were such discrepancies as to create a totally different deed. There is the same reason for not holding the *mala fides* to begin at the judgment of this Court as at the judgment of the Lord Ordinary. It was still one of those doubtful cases which left room for *bonâ fide* possession; and I cannot go into my Lord Robertson's distinction of onerous and lucrative titles, for I conceive that *bona fides* may be equally strong under the one description of title as the other.



*Pursuer's Authorities.*—*M'En*, July 19. 1715, (1759); *Oliphant*, Nov. 30. 1790, (1721); *Wedgewood v. Catto*, June 13. 1820, (not rep.); *Lady Cardross*, April 8. 1712, in *H. of L.* (*Robertson's Appeal Cases*, p. 37); *Walker*, Feb. 16. 1721, in *H. of L.* (*Robertson's Appeal Cases*, p. 405.)

*Defenders' Authorities.*—*Bonny*, July 30. 1760, (1728); *Lealie Grant*, Feb. 9. 1765, (1760); *Lawrie*, June 21. 1769, (1764); *Bowman*, June 11. 1805, (F. C.); *Turner*, March 8. 1820, (F. C.); *Elliott*, May 30. 1822, (ante, Vol. I. No. 499); *D. of Buccleuch and Queensberry*, Nov. 13. 1822, (ante, Vol. II. No. 5. *AF.*); *E. of Wemyss*, Jan. 14. 1823, (ante, Vol. II. No. 108. *AF.*)

INGLIS and WEIR, W. S.—RUSSEL, TOD, and HILL,—Agents.

L. MACKINTOSH, Pursuer.—*Jeffrey*.

No. 439.

T. BRODIE, Defender.—*Marshall*.

*College of Justice*—50. *Geo. III. c. 112.*—Held that a member of the College of Justice, who is the onerous assignee of a party not a member of it, is entitled as such to pursue an action before the Court of Session for a sum less than £25.

MACKINTOSH, a solicitor before the Supreme Courts, obtained an assignation from Ritchie, a cattle-dealer, who had entered into a composition-contract with his creditors, by which he assigned to Mackintosh all claims which he had against his debtors, in respect that Mackintosh had 'not only agreed to guarantee the said composition, but also instantly to pay up the same on the respective claims against me at the instance of my creditors being duly vouched and ascertained, and that he has further made, and has agreed still to make, certain other cash advances on my account.' Mackintosh then brought an action before the Court of Session against several of the debtors of Ritchie, and particularly against Brodie, for £18. 5s. As a preliminary defence against this claim Brodie pleaded, that 'the sum pursued for being of less amount than £25, the action is incompetent, in virtue of the statute 50. Geo. III. c. 112, § 28, and it is not rendered competent by the pursuer being a member of the College of Justice, as the action is pursued by him as the assignee, and for the behoof of the cedent Ritchie.' To this it was answered, that he was an onerous assignee, and thereby creditor in his own right, and that, being a member of the College of Justice, the action was competent at his instance. The Lord Ordinary 'sustained the preliminary or first defence pleaded,' assolizied Brodie, and found Mackintosh liable in expenses. But the Court altered, repelled the defence, found Brodie liable in expenses, and remitted to the Lord Ordinary to proceed accordingly.

June 17. 1826.

1st DIVISION.  
Lord Meadowbank.  
D.

L. MACKINTOSH,—R. NIVEN, W. S.—Agents.

No. 440.

C. A. MOIR, Pursuer.—*Moncreiff—D. Dundas.*  
 Dr. R. GRAHAM and Others, Defenders.—*Cockburn—Wood.*

*Entail—Clause.—Construction of the clauses in a deed of entail relative to the cutting of wood, and pulling down the mansion-house.*

June 20. 1836.

1st Division.

Lord Meadow-

bank.

D.

THE late George Moir executed a deed of entail of the estate of Leckie, (under which the pursuer was the heir in possession,) by which he declared that the heirs should be liable for his debts and deeds—that they should bear exclusively the name and arms of Moir of Leckie—that they should not alter the succession, nor sell nor contract debts affecting the lands, nor do various other special acts therein enumerated. These prohibitions were followed by irritant and resolute clauses directed against these special acts, ‘or doing any other act or deed hereby forbidden and discharged, or neglecting to implement and perform as hereby enjoined.’ There then followed this prohibition and declaration, (of which no notice had been previously taken,) ‘that the heirs foresaid shall have no power, and I hereby prohibit and discharge them from cutting any of the planted wood upon the lands and estate foresaid, except such part thereof as shall be found by decree of the Sheriff of the county, on proof by persons of known skill, to be on the decay; and when any such decayed trees are cut, the heir who cuts them shall be bound to plant of new the like number of trees at least, and sufficiently to fence and train up the young planting; but the said heir shall nevertheless have full power to cut the natural wood when ripe and fit for cutting, not under 25 years of age from last cutting, they always keeping the young growth properly protected: And the heir in possession shall be, and I hereby bind and oblige him or her to make the mansion-house of Leckie his or her domicile and ordinary dwelling-place, and to live and reside there with his or her family, and to maintain, uphold, and keep up the said mansion-house and the whole offices in thorough good repair and sufficient order; and these prohibitions, conditions, and obligations as to cutting the said wood, keeping up the mansion-house and offices, and living and residing there, are hereby expressly declared to be under the irritant and resolute conditions and clauses before written, and that the non-observance of the same shall void the right of the contravener.’ Thereafter he executed a deed of alteration, by which he granted liberty ‘to the heir of entail in possession to cut such fir trees as may have been planted for the purpose of training up the other barren wood, and that so soon as the said fir trees shall be of

‘no use for that purpose; and also to cut such barren wood as may be necessary for repairing the houses on the estate, and for farming utensils, so far as the heir in possession may have occasion for such, he always planting an equal number as shall be so cut, and preserve and train up the same; and to thin the planting where necessary, care being taken not to commit unnecessary waste.’ A question having been raised as to what were the powers of the pursuer in relation to the wood and the house, he brought an action of declarator to have it found,—1. That he was not effectually prohibited from cutting any part of the wood, seeing that the irritant and resolute clauses were applicable to special acts, among which that of cutting the wood was not included;—2. That the prohibition referred only to wood planted by the entailer, and not to wood subsequently planted;—and, 3. That the declaration as to making the mansion-house of Leckie his domicile, and maintaining and upholding it, was not effectually guarded by the irritant and resolute clauses; but, at all events, it should be found that he was entitled to take down the house, provided he built one equally good upon the same site, or on any other which was suitable on the estate. To this it was answered,—1. That the irritant and resolute clauses applied to all the prohibitions mentioned in the deed, and that it was expressly declared that those as to the wood and house were to be subject to their influence;—2. That the prohibition was directed generally against ‘cutting any of the planted wood upon the lands and estate foresaid,’ so that it protected all the wood planted on the estate at any time;—and, 3. That the obligation to uphold and repair the present mansion-house implied that it should not be lawful to pull it down and build another. The Lord Ordinary having reported the case, the Court found,—1. That the prohibitory clauses, both as to the wood and house, were effectually protected by the resolute clause;—but, 2. That the prohibition applied only to the wood planted by the entailer, and not to wood planted since his death, or to be afterwards planted;—and, 3. That the pursuer, or other heir in possession, was entitled to take down the mansion-house and offices, provided he bonâ fide immediately built a house and offices equally as good, and that either on the present site, or any other equally suitable on the estate.

J. DUNDAS, W. S.—A. DOUGLAS, W. S.—Agents.

No. 441. J. WILSON and Others, Pursuers.—*Thomson—Rutherford.*  
W. RIDDELL, Defender.—*Jeffrey—Skene—Boswell.*

*Reparation.*—Circumstances in which it was held, that a party acting as agent for the seller of certain entailed lands sold under the stat. 42. Geo. III. c. 116, for redemption of the land-tax, and who also acted as trustee in terms of that statute, was not liable to indemnify the purchaser on the sale being set aside as irregular; reserving to the seller to claim repetition of the price.

June 20. 1826.

1st Division.

Lord Medwyn.

H.

THE late Sir William Elliott, the heir of entail in possession of the estate of Stobbs, instituted proceedings before the Court of Session, under the statute 42. Geo. III. c. 116, for sale of part of the lands, the price of which was to be applied to redeem the land-tax of the estate in terms of that statute. Mr. Riddell, W. S. was the agent employed by him to accomplish this object; and, after certain proceedings, warrant of sale was obtained. By the 65th section of the statute it is declared, 'That the purchaser shall be taken bound to pay the price to a trustee to be named by the person or persons in whose name, or for whose behoof, such sale or sales is or are carried on, and which trustee shall be approved of by the said Court, and shall find security to their satisfaction, that the sum or sums of money so to be paid to him by the said purchaser or purchasers shall be duly and faithfully applied in the manner and for the purposes herein enjoined and directed; and farther, that the said trustee, upon receipt of the said price or prices, shall be forthwith bound to pay the said money into the Bank of England, to be there placed to the account of the Commissioners for the Reduction of the National Debt, to be by them applied in the manner and for the purposes directed and specified by this act, and the receipt of the cashier or cashiers of the Bank shall be a full and sufficient discharge to the said trustee, and to the said purchaser or purchasers, for the sum or sums of money so agreed to be paid,' &c. Riddell was accordingly appointed trustee, and the lands having been exposed to sale, they were purchased by Sir William Elliott. He, however, did not pay the price, and soon thereafter he sold the greater part of them to Wilson and others. In the conveyances to them it was stated, that Sir William had not paid the price to Riddell, as required by the statute, and they therefore paid the amount stipulated by them to him as trustee, to be applied by him in terms of the statute. On the death of Sir William, an action of reduction of the sale and restitution of the lands was brought by his son, the succeeding heir of entail, founding on numerous irregularities, against Wilson and others, who thereupon instituted an action of relief against Riddell, on the ground,—1. That

as agent of the seller he was bound to indemnify them ;—and, 2. That at all events, as statutory trustee, and being a party to the sale, he was bound to have attended to the regularity of it, and to the due application of the price, and therefore he was bound to relieve them from the consequences of the action of reduction. In defence it was stated by Riddell,—1. That as he had not been employed as the agent of the pursuers, they could have no claim against him in that character ;—and, 2. That the action of reduction rested on numerous irregularities committed in the process of sale, for which as trustee he could not be liable ; that the pursuers were fully aware that the price had not been paid by Sir William Elliott, and so could not have been applied in terms of the statute ; that this was acknowledged in their own title derived from Sir William, and therefore they were barred from making any objection on that ground ; and that the price received from them had since been duly applied. In the mean while the Court had decerned in the reduction on nine special grounds expressed in their interlocutor, one of which was, that the price had not been paid into the Bank of England, as required by the act, before the dispositions were granted to the purchasers. (See ante, Vol. IV. No. 289.) Thereafter the Lord Ordinary found, ‘ That the sale to Sir William Elliott, and the conveyances flowing from him, have been set aside upon a complex view of all the irregularities therein enumerated, and not upon any one or more of them ; that of these the six first can only affect the defender in his character of agent for Sir William Elliott, and the 7th and 9th in his character as trustee under the act of Parliament : That it has been laid down by the Court, that the purchasers from Sir William Elliott could not be hurt by any alleged fraud on the part of Sir William Elliott in carrying through the sale, if the proceedings had been regularly conducted : That the pursuers in this action of relief have no direct action against the defender for his conduct as the agent of Sir William Elliott, and that their own agents were bound to examine and satisfy themselves as to the validity of the titles under which their purchases were made ; and although that title has turned out bad, their claim for redress lies against the seller, and may lie against their own agents, but cannot lie against the private agent of the seller for mere professional mistakes or inadvertencies : That it has been ascertained by the interlocutor of the Court, that the pursuers were made aware that the act had not been followed out : That as to the 7th and 9th findings, which apply to Mr. Riddell the defender as trustee, finds that his duty qua such was to receive payment from the purchaser at the sale in virtue of the

' said act, and pay the amount into the Bank of England, and  
 ' the receipt by the cashier of the Bank is declared to be a sufficient  
 ' discharge to the trustee as well as to the purchaser, who is then  
 ' entitled to demand a conveyance from the heir of entail: That  
 ' the purchases made by both the pursuers were made, not from  
 ' Sir William Elliott as heir of entail, and by them as purchasers  
 ' under the act of Parliament, but from Sir William as the pur-  
 ' chaser under this act of Parliament of certain parts of the estate  
 ' of Stobbs, and as holding them in fee-simple; and further, while  
 ' the pursuers saw that Sir William Elliott had not as yet paid  
 ' the price, nor had enabled the trustee to comply with the act  
 ' of Parliament, they were content to pay the price to the de-  
 ' fender as trustee, in order that it might be applied in terms of  
 ' the act and warrant of the Court: That the price so received  
 ' by Mr. Riddell, although not paid into the Bank of England,  
 ' was applied partly in paying the land-tax and debts affecting the  
 ' entailed estate under warrants of this Court; but in so far as any  
 ' part of the said price has not been so applied, that Mr Riddell will  
 ' be liable to repeat and pay back the same to the pursuers, when  
 ' a proper process to that effect is instituted, but that such claim  
 ' cannot be pursued under the present action of relief and da-  
 ' mages; therefore sustained the defences, and assoilzied the de-  
 ' fender.' The pursuers having reclaimed, the Court adhered;  
 reserving to the pursuers to be heard in this or any competent  
 action on their claim for repetition of the price paid to the de-  
 fender, and to him his defences against the competency or merits  
 of such claim.

JAMES DUNDAS, W. S.—DAVID WATSON, and H. DAVIDSON, W. S.—  
 Agents.

No. 442.

JAMES GALBRAITH, Pursuer.—*Moncreiff—Brown.*

RICHARD GALBRAITH, Defender.—*D. of F. Cranstown—Baird.*

*Service, Reduction of.*—The Court refused to reduce a service obtained in a competi-  
 tion, the allegation being, that there was no sufficient evidence led before the inquest  
 that the party's ancestor, bearing the same name and general designation ' of a Me-  
 ' jor in the kingdom of Ireland,' was truly the substitute called in the deed of entail,  
 in respect the pursuer of the reduction failed to establish the existence of any other  
 person to whom the designation in the entail could apply.

June 20. 1826.

2d DIVISION.  
 Lord Macken-  
 zie.  
 B.

IN 1705, James Galbraith of Balgair executed a deed of entail,  
 whereby he conveyed the lands of Balgair to himself and the heirs  
 of his body, whom failing, to the following substitutes,—1. John  
 Galbraith, eldest son of George Galbraith, merchant burges in  
 Edinburgh, the entailor's cousin-german;—2. James, second son

of the said George Galbraith;—3. ‘Major Hugh Galbraith in the kingdom of Ireland, son of the deceased Andrew Galbraith, the entailer’s father’s brother consanguinean;’—4. Captain Robert Galbraith in the kingdom of Ireland;—5. John Galbraith of Old Graden;—6. Archibald Buchanan of Drumnhead, and such of his sons as the entailer should point out;—7. John Galbraith in Hill of Balgair, and the heirs-male of their several bodies respectively; whom all failing, to certain other substitutes.

The entailer left no issue, and in 1794 the 1st and 2d branches of the substitution became extinct by the death of the heir then in possession of the estate. Advertisements were thereupon inserted in the newspapers, calling on the heirs next in succession to come forward; in consequence of which, brieves were sued out by Richard Galbraith, the present defender, claiming as heir-male of Major Hugh Galbraith, the third substitute in the entail, and also by William Arthur Galbraith, who claimed as representing Captain Robert Galbraith the fourth substitute. A competition ensued, in which Richard Galbraith established his descent from a Major Hugh Galbraith of Capahard in the kingdom of Ireland, who was a Major in the King’s army at the date of the entail. The chief evidence of the above person being the Major Hugh mentioned in the third substitution was, that he was proved to have spoken with a Scottish accent, and to have been considered a Scotchman; and that in a letter from the son of Captain Robert, the fourth substitute, (who resided near the Major in Ireland,) to the son of the latter, he addressed him as ‘dear cousin.’ But there was no other trace of his connexion with the family of Balgair, while the will of Captain Robert, the fourth substitute, executed in 1708, contained a reference to the event of his eldest son succeeding to the estate of James Galbraith of Balgair, which, it was said, could not have happened if this Major Galbraith of Capahard, who resided in his neighbourhood, had been the third substitute, as he had five sons, all of whom must, of course, have succeeded before Captain Robert’s family. On the other hand, William Arthur Galbraith entirely failed in proving any connexion with the fourth substitute; and in 1806 the Jury by a majority served Richard, who accordingly entered into possession of the estate of Balgair. In 1820, the pursuer James Galbraith, being the heir-male of John Galbraith in Hill of Balgair, the seventh substitute, raised the present action, concluding for reduction of Richard’s service, on the ground that there was no sufficient evidence led before the inquest that his ancestor was Major Hugh Galbraith, the third substitute in the entail. After some discussion on objections to the pursuer’s

title, which were repelled, and some further procedure, the Lord Ordinary found, 'That, in the absence of all proof existing or offered to the contrary, the circumstances proven on the side of the defender afford sufficient grounds for inferring that Major Hugh Galbraith, of whose body the defender is heir-male, was Major Galbraith of the kingdom of Ireland, who and the heirs of whose body are called in the entail of Balgair,' and therefore repelled the reasons of reduction, and assoilzied the defender. The pursuer then reclaimed, and endeavoured to maintain, (by reference to the proof formerly taken, and other documents now produced for the first time,)—1. That there had existed another Hugh Galbraith of St. Johnston in the kingdom of Ireland, who had died without issue, (a few months, however, prior to the date of the entail,) and who, though not in the King's army so far as appeared, was yet known by the appellation of Major Galbraith, and that he was the same person with a Hugh Galbraith, at one time merchant in Glasgow, who was undoubtedly a relation of the Balgair family, and therefore was probably the person called in the third substitution;—2. That he was not bound to establish that another Major Galbraith than the defender's ancestor was the person called in the entail;—and, 3. That it was sufficient to entitle him to succeed in this reduction, that the defender had failed to prove by sufficient evidence before the inquest, that his ancestor was truly that person. The Court, however, by a majority, adhered to the Lord Ordinary's interlocutor.

Their Lordships were generally agreed, that had this been a competition of briefs, there was not sufficient evidence of the defender's ancestor being the third substitute in the entail to have warranted the Jury to serve him in opposition to the pursuer, who was undoubtedly the heir-male of the seventh substitute; but the majority were of opinion, that in a reduction of a service obtained in a competition, it was incumbent on the pursuer to disprove the service, or at least to show that there did exist another Major Hugh Galbraith of the kingdom of Ireland, who might have been the third substitute, in the attempt to do which, they considered that he had failed. Lord Alloway, on the other hand, was of opinion that the circumstance of this being a reduction made no distinction, and that the absence of all evidence that Major Hugh Galbraith of Capahard was any way related to the family of Balgair, was sufficient to warrant a reduction, independent of the other circumstances, which his Lordship thought went a great way in establishing that another person, generally known as Major Hugh Galbraith, had lived



at St. Johnston in the kingdom of Ireland, and that he was a relation of the family.

J. KEE and H. G. DICKSON, W. S.—W. MERCEE, W. S.—Agents.

D. RAMSAY, Claimant.—*Shaw.*

No. 443.

A. GOLDIE, Respondent.—*Whigham.*

*Penalty.*—Held that a creditor under a bond, who has incurred expenses in defending it in a question with a third party, is entitled, in claiming on the estate of his debtor, to rank for these expenses under his penalty, notwithstanding that, in the litigation with the third party, the Court had found no expenses due.

THE late Mr. Glendonwyn of Parton married the heiress of Crogo, who conveyed to him her estate, under a reserved power of burdening it with provisions in favour of her children. In the exercise of this power, she and her husband granted a bond of provision in favour of her daughter Mrs. Scott for £1850, payable 'within twelve months next after the longest liver of us two, me or my said husband, her father, with a fifth part of the principal sum of liquidate penalty in case of failie.' Mr. Glendonwyn afterwards sold both these estates to Mr. Scott, the husband of Mrs. Scott, subject to the burden of the price, amounting to upwards of £72,000. Mr. and Mrs. Glendonwyn died, and the bond was not paid at the stipulated period. Mr. Scott having become insolvent, a ranking and sale of his estates of Crogo and Parton was brought, in which Mr. Goldie was appointed common agent for the creditors of Mr. Scott. Mrs. Scott then assigned her bond to Mr. Ramsay, who lodged a claim for its amount, including penalty and interest, as a creditor of Mr. Glendonwyn. To this it was objected, that the bond must be held to be personal, and to belong jure mariti to Mr. Scott, and therefore compensated by the claims which the creditors had against him. On the other hand, it was contended by Mr. Ramsay that the bond was heritable, and therefore belonged to Mrs. Scott in her own right, so that compensation was not admissible. The Lord Ordinary repelled the objections, and 'ordained the common agent to rank Mr. Ramsay in his proper place upon the price of the estate of Parton, as a creditor of the late Mr. Glendonwyn, for the whole amount of his claim.' To this interlocutor the Court adhered, but found no expenses due. (See ante, Vol. IV. No. 92.) Mr. Ramsay having then applied for a warrant for payment to him of the sum contained in the bond, together with the expenses which he had incurred in the above litigation as falling under the penalty, and the Court having remitted to the Lord

June 22. 1826.

1st Division.

Lord Eldin.

S.

Ordinary, Mr. Goldie objected to the claim for expenses, that as the Court had found no expenses due, it was not competent to award them even as part of the penalty. In answer to this it was stated by Mr. Ramsay,—1. That it had been finally decided that he was entitled to be ranked on the price as a creditor of Mr. Glendonwyn; that that price formed a separate and independent estate from that of Mr. Scott, and over which Mr. Goldie had no right; that Mr. Ramsay claimed as a creditor not of Mr. Scott, but of Mr. Glendonwyn; that the finding of the Court had reference only to a claim of expenses as against the estate of Mr. Scott; and that such being the case, and as no claim was made out of his estate, but only out of that of the proper debtor, who had failed to pay the bond, and so had incurred the penalty, he was entitled to draw payment of it to the effect of full indemnification. The Lord Ordinary sustained the claim for the expenses, and the Court adhered.

The Court were of opinion, that as the expenses were claimed out of the estate of Mr. Glendonwyn, the proper debtor, and not out of that of Mr. Scott, the interlocutor finding no expenses due did not bar the claim, and that Mr. Ramsay was entitled to be indemnified out of the debtor's estate for all the expenses he had incurred in the course of making his debt effectual, and which ought to have been paid long before.

*Claimant's Authority.*—Allardice, June 19. 1798, (10052)

*Respondent's Authorities.*—Allan, Dec. 23. 1757, (10047); Gordon, Nov. 27. 1761, (10050); Young, May 21. 1796, (10053.)

DONALDSON and RAMSAY, W. S.—A. GOLDIE, W. S.—Agents.

No. 444.

J. SMITH, Advocate.—*Fullerton—Shaw Stewart.*

J. CRAWFORD, Respondent.—*Greenshields.*

*Possessory Right—Church.*—Circumstances in which heritors were found not entitled to apply summarily for a division of a parish church.

June 22. 1826.

1st Division.  
Lord Eldin.

D.

THE family of Mr. Scott of Kerseland were at one time extensive heritors in the parish of Dalry in Ayrshire, and were proprietors in their own right of an aisle forming part of the parish church. In 1770, the heritors resolved to build a new church, and an agreement was entered into with Mr. Scott, 'that he should have as much of the said new church as the area of the aisle which belonged to him amounted to, viz. 16½ feet by 15½ feet, upon his paying £10 sterling, and allowing us to take his said aisle, and to use the stones and slates thereof in building

'the said church.' When the church was erected no regular division was made, but seats were allotted to the respective heritors by a voluntary arrangement among themselves; and it was declared by the deed of agreement that Mr. Scott should have right to an area of the above extent in a particular part of the church, 'with full power to the said Charles Scott and his 'foresaids to sell, set up, and dispose upon the same in time 'coming at pleasure.' In 1801, Mr. Scott's estates, including the above aisle or area, were judicially sold, and it was purchased by Smith, an heritor of the parish. In 1825, Crawford and several heritors who had acquired lands in the parish, presented a petition to the Sheriff of Ayrshire, stating that the church had never been regularly divided; that they had not the number of seats to which they were entitled; and that Mr. Smith possessed a larger portion of the area than he had right to, and therefore praying for a division. The Sheriff having decerned accordingly, and Smith having brought an advocacy, the Lord Ordinary found 'that 'the application to the Sheriff to invert the possession, after the 'long possession that had followed on the division of the church, 'was incompetent; and in respect that no good ground had been 'assigned for changing the division and allocation of the seats, 'and that the division and allocation appears to have been proper 'and reasonable in itself,' assoilzied Mr. Smith; and the Court adhered.

**LORD PRESIDENT.**—Mr. Smith holds his right by heritable titles, and it is quite incompetent to turn him out of possession by petition to the Sheriff; and besides, there was an agreement among the heritors which has been acquiesced in for upwards of 50 years.

**LORD CRAIGIE.**—I am of a different opinion. The church belongs to the heritors, and it is said that a majority of them thought fit to sell part of the area to Mr. Smith's authors; but the respondents are singular successors, and as such have acquired right as heritors. That transaction cannot affect them, because every heritor in the parish is entitled to a seat in the church; and if Mr. Smith's argument be good for any thing at all, it must go the length to exclude these parties from seats altogether. There has never been a proper division in terms of law, and any heritor is entitled to insist for this at any time whatever.

**LORD BALGRAY.**—The law, as laid down by Lord Craigie, is no doubt correct in a general point of view, but this is a special case. Here a person was proprietor in his own right of an aisle, and the heritors, who wanted to build on the area of it, entered into a bargain with him, by which he gave up that aisle in consideration of receiving a part of the area of the new church. On this agreement possession

has taken place for 50 years, and I apprehend, therefore, that it is incompetent to proceed in the manner that has been done by the respondents.

**LORD GILLIES.**—The general rule does not apply to this case, and I concur in the opinion of Lord Balgray.

**W. PATRICK, W. S.—DONALDSON and RAMSAY, W. S.—Agents.**

No. 445.

**W. FULTON, Pursuer.—Bell—Shaw.**

**J. LEAD, Defender.—Greenshields—Moncreiff.**

*Bankrupt—Stat. 1696, c. 5.*—Held that an heritable bond is not liable to be set aside, as having been granted in security of future debts, the creditor having granted an obligation to pay the full amount on receiving a search of incumbrances, and having paid the money on the search being made, and infestment taken.

June 22. 1826.

1st Division.

Lord Medwyn.

S.

**FULTON**, as trustee on the sequestrated estate of Love, raised an action of reduction of a bond granted by the bankrupt for £1400 to the defender **Lead**, which he alleged had, to the extent of £600, been given in security of a future debt, and therefore was reducible, quoad hoc, in terms of the statute 1696, c. 5. In defence **Lead** stated, that, at the time when the bond was granted, Love was indebted to him in £600; that he gave to him his bill for £200, which he had since retired, and also an obligatory letter for the balance of £600, which sum was to be paid after a search of incumbrances had been produced, and the recorded sasine delivered to him; that accordingly sasine was taken, and two months thereafter the search was exhibited, and the recorded sasine delivered to him, and that thereupon he had paid the sum specified in the letter. **Fulton** having denied that any such obligation had been granted, the Lord Ordinary found ‘the allegations, that, at the time of signing the bond, an obligation was granted by the defender, and delivered to the bankrupt, obliging himself to pay what remained to make up the sum in the bond on a search of incumbrances being produced,—and separatim, that the bond was not delivered to the creditor till the full amount was paid up,—sufficient to elide the challenge, on the ground that the bond was granted for subsequent contractions;’ and appointed the parties to state, whether there was any objection to a remit to the Jury Court, to ascertain the truth of these averments. The Court, however, recalled this interlocutor, and remitted to the Lord Ordinary, ‘before answer, to receive a condescendence from the defender of what he avers and offers to prove respecting the sum of money actually advanced, or obligation incurred by him, with a view to the security granted to him for £1400.’

(See ante, Vol. IV. No. 138.) A condescendence having been accordingly lodged, and the record closed, a proof was allowed in terms of the above interlocutor. The two principal witnesses were the bankrupt and his wife, the former of whom deponed, 'That the parties met in the deponent's house at Muirdikes to complete the transaction, and on that occasion the accounts between him and the defender were squared, and the bond was executed by the deponent, he, at the same time, getting from the defender the defender's own bill for £200, and also a letter, if he recollects right, by the defender to him, which specified the exact balance which was to be paid to the deponent, and this balance hardly amounted to £600: That the letter contained a promise, or obligation of some sort, to pay that balance to the deponent, but the deponent is unable to remember whether any time of payment was specified.' He afterwards explained that he had no doubt that the letter had been given, but he could not recollect the exact nature of its contents, and that he had delivered it to his wife. He also deponed that he got back the letter from his wife, and subsequently received payment of the amount from the defender, on which he delivered up the letter, and that it had been arranged that the money so paid should be retained by the defender 'till he should make a search, in order to be satisfied that there was nothing upon the deponent's property besides the intended loan.' His wife deponed that she received the letter from her husband—that it was an obligation for between £500 and £600, and that she afterwards returned it to him. Another witness deponed that he accidentally saw the letter for a few moments, and that it expressed an obligation for several hundred pounds. The Lord Ordinary found that the facts alleged in defence were proved, and 'that the defender being absolutely bound to pay such a sum as would make up, with sums advanced at and prior to the date of the bond for which the said bond was granted, and having actually paid sums making the full amount of his advances £1400, as soon as the search of incumbrances was transmitted to him, the said bond is not challengeable to any extent, on the ground that it was granted without any just or necessary cause, but in security of a future debt, with the intention to give an unfair preference over the granter's other lawful creditors;' and therefore repelled the reasons of reduction, and assoilzied the defender; and the Court adhered.

*Defender's Authorities.*—Abercrombie, July 30. 1789, (Bell's Cases, p. 57); 2. Elchies, 146; 2. Bell, 247; Bell on Convey. 347; Bank of Scotland, March 1. 1781, (14121); Maxwell, Jan. 21. 1823, (ante, Vol. II. No. 128.)

A. NAIRNE,—W. A. MARTIN,—Agents.

No. 446. S. PEACOCK and Others, Pursuers.—*Moncreiff—Buchanan.*  
A. GLEN, Defender.—*D. of F. Cranston—More.*

*Fee or Substitution—Service—Clause.*—A party having disposed lands to his wife in conjunct liferent, and 'to the heirs of my body of my present or any future marriage 'in fee, whom failing,' to A. B. nominatim; and the disposer having died without issue, and A. B. having thereupon executed the precept and taken infeftment without service—Held that his title was inept.

June 22. 1826.

2d DIVISION.

Lord Pitmilly.

F.

THE late Mr. Beattie, by disposition and deed of settlement executed in 1802, conveyed the lands of Foulshiels 'to and in 'favour of Christian Duthie, my spouse, in conjunct liferent, for 'her liferent use, in case she shall survive me, allenarly, and to 'the heirs of my body of my present or any after marriage in fee; 'whom failing, to William Beattie, goldsmith in London, my 'nephew, second son of the now deceased James Beattie, goldsmith in London, my brother, and the heirs of his body; whom 'also failing, to my own nearest heirs and assignees whomsoever 'in fee;' reserving 'my own liferent and use of the lands,' and 'also full power, faculty, and liberty, at any time of my life, 'without consent of my said spouse, my nephew, or heirs before 'mentioned, to sell and dispose of the whole or any part of the 'said lands, &c., or to contract debts thereon, and to do every 'act of property thereanent in the same way as if these presents 'had not been executed.' This deed contained further an obligation to infest 'the said Christian Duthie, my spouse, in liferent, 'and the heirs of my body; whom failing, the said William 'Beattie and the heirs of his body; whom failing, my nearest 'heirs or assignees whomsoever in fee;' and a procuratory of resignation in favour of his spouse and William Beattie nominatim, and the other heirs, in precisely the same terms; and likewise a precept of sasine for giving infeftment 'to the said Christian 'Duthie, my spouse, in liferent, and to my heirs and disponees 'in the order before mentioned, in fee.'

Mr. Beattie, the granter of this deed, having died without having had any heirs of his body, William Beattie, his nephew, (who was not, however, his heir of line,) took up the lands under this disposition, and in 1805, without any service or declarator, obtained himself infeft, as disponee, on the unexecuted precept of sasine. The instrument of sasine set forth, in common form, the comparance of a procurator for William Beattie, having and holding in his hands an extract of the disposition, the terms of which are narrated, and that the bailie, 'by virtue thereof,' gave and delivered to the said William Beattie heritable state and sasine of the lands of Foulshiels. Shortly thereafter, Beattie granted to Glen, the defender, an heritable bond over the lands for

£1000, on which he was infest. Beattie having afterwards become bankrupt, and a commission of bankruptcy having been issued against him in England, Peacock and others, the assignees under the commission, made up titles to the lands by adjudication on a charge to Beattie to enter heir of provision to his uncle. They then raised an action of reduction of the bond and sasine in favour of Glen, on the ground that 'the said pretended bond and disposition was executed by the said William Beattie without his having any feudal title in his person to the lands of Foulshiels, over which the said pretended security extends, and the said bond and disposition is therefore reducible, as flowing from a non habente potestatem;' and in support of it they pleaded, that, in order to create a valid title, it was absolutely necessary that William Beattie should have served heir of provision to his uncle,—1. Because the latter had in fact, by the terms of the deed, reserved to himself the fee of the property;—and, 2. Because, as there were two substitutions, (viz. the heirs of the granter's body by his present marriage, and his heirs by any future marriage,) prior to that in favour of William Beattie, and as he was only called as a substitute, it was essential to establish by a service the failure of these prior heirs; and they founded on the case of Gordon of Carleton, the facts of which, as stated by Lord Kilkerran, they showed were confirmed by the session papers, in opposition to the report of Falconer. On the other hand, it was contended for Glen,—1. That as by the disposition the fee was not taken to the granter himself, whom failing, to the heirs of his body, but simply to the heirs nascituris of his body, whom failing, to William Beattie nominatim, the fee was thereby conveyed out of the granter's person, and consequently Beattie was entitled to take infestment as disponee, being in truth a conditional institute;—and, 2. That a service was only essential where a right was to be transmitted, but that, in the present case, there being no fee left in the granter's person, and none having existed in any intermediate heir, it could only be of use, in modum probationis, to establish the non-existence of any prior heirs; that such proof was not necessary to validate the infestment of a nominatim disponee, although prior heirs nascituri were called,—the infestment being valid, unless heirs actually had existed; or, at least, that where service was not essential for the purpose of transmission, the evidence of the fact of the failure of prior heirs might be competently established after the infestment, and was here admitted. The Lord Ordinary having reported the cause, the Court, by a majority, found 'that there was no proper feudal title in the person of William Beattie junior at the date of the bond in security in question,' and therefore reduced the bond

and infeftment thereon accordingly. Against this judgment Glen reclaimed, and in the mean time raised a summons of declarator that old Beattie had died without issue of his body; but their Lordships adhered.

**LORD GLENLEE.**—The want of feudal right in William Beattie is founded on the nullity of the infeftment. In the papers a great deal more is said about services and declarators than is at all necessary, and in the defender's argument it is taken for granted that the precept of sasine is in the same terms with the procuratory. But this is not the case, for the precept does not mention young Beattie at all. A question as to the due execution of a precept of sasine, after the death of the granter, could not have arisen till after the act 1693, c. 35, as, before that, the precept must have fallen by his death. This act, however, authorizes infeftment to be given after the granter's death, provided always that the titles of the party be deduced in the instrument, otherwise to be null; and I cannot see how the mere production of the disposition and precept is in every case a sufficient compliance with the act; so that, even if Beattie had brought a declarator here, yet, if not deduced in the instrument, the sasine would have been null. But although this act of Parliament had said nothing about deduction of the title, still a notary is not entitled to judge of any thing but whether the party obtaining infeftment be the person named in the precept, and the lands those specified therein; and in the case of *Belshes v. Stewart*, the notary was held not entitled to determine what were the lands falling under the vague description of the granter's lands to the north of the Pass of Killiecrankie. The notary, therefore, had no power to determine whether old Beattie left children or not, and to infest William Beattie, who was a substitute, and not a conditional institute, without proper evidence of the failure of the prior heirs. In this view, therefore, I am not much inclined to go into the question of service at all; although it does not necessarily follow that a service cannot be properly expedited to the disponent, because he has not taken the fee to himself.

**LORD ROBERTSON** concurred.

**LORD PITMILLY.**—This is a question of great difficulty, in regard to which, if I found a decision to regulate it, I should be very unwilling to give a contrary opinion, and I therefore laid great weight formerly on Lord Kilkerran's report of the case of Carleton, and consequently my opinion was shaken by the circumstances, which seemed to indicate that his Lordship's report was incorrect. It now turns out, however, that in point of fact it is perfectly correct, and that John Gordon did actually predecease the granter; so that I have had no reason to alter my former opinion. Many of the points argued by the defenders are not disputed. A general service was not necessary here, and would have been of



no use in carrying the personal right to the lands under the disposition. Old Beattie, although he reserved the liferent and a power to sell, disposed not to himself, but to his heirs, whom failing, &c., and thus divested himself of the personal fee. If the conveyance had been to himself, then a service would have been necessary to transmit the right; but, even where nothing is to be carried, a service may be proper for other purposes. Thus, if old Beattie had had heirs, they must have served agreeably to the decision in the case of Hay of Drummelzier; and in the circumstances in which William Beattie stood, a service was necessary to warrant the infestment; and though the service must have been to his uncle, such a procedure is sanctioned by the case of Carleton. The bailie was not entitled to give infestment *de plano*, without evidence of the heirs of old Beattie having failed, and there is also a great deal in the circumstance of the precept not naming William Beattie at all, although, no doubt, it refers to the disposition. Neither is the instrument of sasine in conformity with the Act 1693, referred to by Lord Glenlee. It is said that a declarator would have been sufficient to establish the failure of heirs, so as to warrant the infestment; but it is unnecessary to say whether it would have been so or not, as there was no declarator here, nor any evidence produced to instruct the failure of the prior heirs; and as to a declarator brought now, it cannot remedy the defect at taking infestment. The case of Mercer, founded on by the defender, was decided by a narrow majority, and was prior to the case of Carleton, in which it was disregarded.

**LORD ALLOWAY.**—This is a case of great importance, and I fear that much danger may arise from adhering to the interlocutor. The disposition here is to the granter's heirs; whom failing, to William Beattie nominatim. He is infest, and his infestment is unchallenged, and the defender advances money to this person, whose infestment appears on the record. But it is now said that it is invalid, because the notary had no evidence of the failure of the granter's heirs. The infestment, however, was given within three years of the date of the deed, and it might be within his personal knowledge that the granter died without issue; and what, therefore, was to prevent him from giving infestment to the nominatim disponent? Where a disponent conveys the fee to himself, a service is necessary to take it up; but where nothing remains in the granter, a service can carry nothing. It may no doubt be often expedient to have a service for evidence of what the notary is not entitled to assume. But the matter here was so recent, that I cannot see how a service should have been necessary to prove that old Beattie died without children. That was a fact of which the notary was entitled to judge from his own knowledge; and it is offered to be proved here. I do not think, however, that such proof is

necessary, as the fact has never been denied ; but if it were disputed, which it is not, it would still be competent to prove by declarator that he died without issue. A service incurs a general representation, and must a man run this risk, to establish a fact which may be known to all the country, and has never been contradicted ? Then the disposition here was to heirs only in posse, and it is admitted that none ever existed ; so that if a service was necessary, it could not be to the children, and no right remained in old Beattie to be taken up. The case of Carleton did not bring out the question such as we have here,—whether Nathaniel had not a personal right in him, and might not have taken without a service,—for the creditors had no interest unless they could oblige him to take through John ; and although it appears that John did actually predecease the grantor, yet the law, as argued by President Craigie in the paper recited in the defender's petition, on the assumption of his having survived, seems never to have been disputed, and applies directly to the case as it stands here ; William Beattie being in exactly the same circumstances with John Gordon, had the latter survived as is assumed in that paper, in the law as laid down in which, I entirely concur. My opinions on this point have been formed under Lords Braxfield and Eskgrove, the two ablest conveyancers ever on the Bench ; and as the case is one of great importance, I should wish to have the opinions of the other Division.

**LORD JUSTICE-CLERK.**—The case having formerly received the judgment of the Court, I thought the most material point to be considered now was, whether Falconer's report of the case of Carleton was correct ; for, if so, it would have greatly impaired its authority as applied to the present case. But it is now admitted that Kilkerran is right, and that John Gordon predeceased the grantor ; and this being the true state of the fact, that judgment is of importance here, as establishing that a service in such circumstances is a proper and legitimate procedure, whatever may be the effect to be given it. In that case, Nathaniel Gordon was held to have served properly as heir of provision to the grantor. If it had been John who had survived and so served, it would have been exactly the case here ; but Nathaniel was further removed from the grantor, with a nominatim substitution intervening, and yet his service was found to be a proper procedure ; and it is therefore an authority a fortiori to show that a service might have been expedite to old Beattie. What effect it would have had, is another question. But I must demur to the proposition contended for by the defender, that William Beattie was a conditional institute ;—he was a *substitute* called on failure of heirs of the marriage. On the face of the deed, therefore, this was a case in which evidence ought to have been produced of the party's title to obtain infeftment ; but no such evi-

dence appears on the instrument. The notary was not entitled, on the attorney's mere statement, to take it for granted that old Beattie died without issue, and he was not warranted to give in-festment without satisfactory evidence of that fact; and there can be no doubt but that a service as heir of provision would have been sufficient, and also a perfect deduction of titles under the act 1693. Whether or not a declarator would have done at first it is unnecessary to inquire, as it certainly cannot now be allowed post tantum temporis, and after a complete right has been vested in the assignees.

*Pursuers' Authorities.*—3. Stair, 5. 6. 23-51; 3. Ersk. 8. 73; 3. Bank. 5. 22; Gordon of Carleton, Feb. 8. 1748, (Kilkerran's Report, 14868); Frog, Nov. 25. 1725, (4262); Cumming, Feb. 10. 1756, (6268); Douglas, July 7. 1701, (4269); Cuthbertson, March 1. 1781, (4279.)

*Defender's Authorities.*—Stewart, March 7. 1799, (14407); 3. Ersk. 8. 73. 9. 9; 3. Stair, 5. 6; Gordon v. M'Culloch, (Bell's Cases, p. 188); Mercer, June 5. 1745, (9788); Gordon's Trustees v. Harper, Dec. 4. 1821, (ante, Vol. I. No. 221.)

GIBSON-CRAIGS and WARDLAW, W. S.—J. MOWBRAY, W. S.—Agents.

S. MENZIES, Suspender.—*Keay—Rutherford.*

No. 447.

T. MARTIN, Charger.—*Sol.-Gen. Hope—Skene.*

*Compensation—Trust.*—A party having granted an alimentary annuity in trust for his brother, not entitled to retain the annuity in compensation of sums advanced to the brother by himself.

JOHN M'NAUGHTON MENZIES having been left totally unprovided for by his father, (the entail of whose estate did not permit him to make any provision for younger children,) his elder brother, the suspender, on his accession to the estate, conveyed to certain trustees, of whom Martin alone accepted, the principal sum of £4000 and an annuity of £100, payable during his brother's life, to form a trust-fund for his behoof, but not to be attachable at the instance of his creditors. The trustees were, however, empowered to apply such sums as they might reserve out of the annuity and interest of the £4000, in extinction of his debts, whenever they should think the same fit and proper. John Menzies fell into extravagant habits, and incurred considerable debts, and at different times his brother made advances to him when in distress. Having been charged, in 1824, by Martin to make payment of some arrears of the annuity, the brother brought a suspension, on the ground,—1. That he was entitled to anticipate it by payment to John Menzies himself, without the intervention of the trustee;—and, 2. That at least he had right to set

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off these advances as a counter claim against payment of the annuity. To this it was answered, that this would be superseding the trust, which the suspender was not entitled to do, and obtaining a preference for himself over the other creditors of his brother, which the trustee was not bound to allow him. The Lord Ordinary found the letters orderly proceeded, and the Court unanimously adhered.

D. STEWART,—A. STEVENSON, W. S.—Agents.

No. 448.

J. BLACK, Advocate.—*A. McNeill*.

W. BROWN, Respondent.—*Jamieson*.

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Lord Cringletie.

M'K.

*Process*.—THE Court, in an advocacy brought under review of the Court by a reclaiming note, refused to grant an order for printing a proof taken in the Inferior Court, in respect it did not form part of the record; but their Lordships allowed it to be printed by the party wishing to found on it.

R. and A. KENNEDY, W. S.—CAMPBELL and MACDOWALL,—Agents.

No. 449.

A. LINDSAY, Suspender.—*Jamieson*.

JEAN BARR, Charger.—*R. Bell*.

*Small Debt Act—Jurisdiction*.—Bill of suspension passed without caution of a charge on a decree in absence of the Justices of Peace in the Small Debt Court, in an action for £2 of inlying charges, and £1. 10s. as one quarter's aliment of a bastard child, and of which the paternity had not been established.

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Bill-Chamber.

Lord Cringletie.

B.

JEAN BARR having been delivered of a natural child, brought an action, about three months thereafter, before the Justices of Peace of the county of Lanark, under the Small Debt Act, against Lindsay, whom she alleged to be the father, for payment of £2 of inlying expenses, and £1. 10s. as aliment for the child for the quarter which had expired since its birth. Lindsay allowed decree to pass against him in absence, and presented a bill of suspension, which the Lord Ordinary refused as incompetent. Lindsay then reclaimed, and contended that the Justices in the Small Debt Court had no jurisdiction in a matter like this, which, though nominally for a sum under £5, being improperly split by the charger into quarterly payments, decided his liability for an annual payment, involving a much greater value, and likewise the filiation of the child, and consequently that his bill of suspension was competent. To this it was answered by Barr, that as no more was due than one quarter's aliment when she brought her action before the Small Debt Court, there had been no attempt on

her part to evade the act of Parliament, which did not expressly except a claim of this nature from the general words, clearly comprehending such a claim as falling within the jurisdiction of the Small Debt Court. Their Lordships unanimously recalled the Lord Ordinary's interlocutor, and remitted to pass the bill without caution.

CAMPBELL and MACDOWALL,—GEORGE MILL,—Agents.

CATHERINE GENTLES and Others, Pursuers.—*R. Riddell.*

No. 450.

J. AITKEN, Defender.—*More.*

*Husband and Wife—Postnuptial Contract of Marriage.*—Provision by a wife in a postnuptial contract in favour of her husband's children by a former marriage, held not to be revocable by her after her husband's death.

**WILLIAM GENTLES**, who had two daughters by a former wife, married Jean Adam or Aitken, who also had a family by a previous marriage. A few years after their marriage, having no children by each other, they, 'considering that we have been married for several years past, and that no contract or other deed of settlement hath been executed by us, and having resolved to supply that defect,' executed a postnuptial contract, whereby Gentles conveyed to his wife the liferent of all his moveable property, in the event of her survivance; and she, on the other part, conveyed absolutely to him all her moveable property; and she further, by a subsequent part of the deed, burdened an heritable property belonging to her with payment (among a number of legacies which the deed provided to her own children and grandchildren) of £50 to the daughters of Gentles by his former marriage, 'declaring, that on payment of these sums to the said legatees, they, nor either of them, shall have any claim or demand against me or my heirs, or my husband, or on the goods in communion, or otherwise.' The parties further conveyed to the children of the wife all the household furniture and moveable effects which should belong to them at the death of the longest liver; and it was declared, 'that the deed shall be good and effectual, wherever found unaltered at our decease.' Gentles died without having executed any revocation; and his wife, immediately on his death, entered into possession of his whole moveable property, and survived him several years. Previous to her death, however, she executed in favour of John Aitken, her son, by her former marriage, a disposition of her heritable property, containing a general clause revoking all deeds 'which can in any shape interfere with the purposes of this deed.' Aitken having

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sic.

B.

refused, after her death, to account for his intrusions with Gentles' property, or to pay the provision of £50, Catherine Gentles, one of William Gentles' daughters, and the children of the other daughter, now deceased, brought an action against him, concluding, *inter alia*, for payment of this £50. Aitken pleaded in defence, that the deed executed by the spouses combined the two objects of a mutual contract and a settlement,—the latter part, whereby the different provisions and legacies were left, being simply a settlement;—that the provision of £50 to the children of Gentles was merely a legacy revocable by Jean Adam; and that it had been so revoked by the general disposition in his favour of the lands burdened with the payment of it. To this it was answered,—1. That the whole deed constituted a mutual and onerous contract, which could not be revoked by the one party after the death of the other;—and, 2. That although the provision were to be considered as a special legacy, an express revocation was necessary to affect it; and that even if it were revocable without such express revocation, the clause in the general disposition did not include it. The Lord Ordinary assailed Aitken 'from the conclusion for payment of the £50,' observing in a note, 'The £50 seems to the Lord Ordinary to have been given by way of legacy or donation *mortis causâ* revocable, and that legacy to have been revoked.' But the Court unanimously altered, and decreed for payment of the £50, with expenses.

**LORD GLENLEE.**—It is dangerous to be swayed by the name given to any thing. The question is, what has actually been done? And though called a legacy, this provision is an ingredient in the counter stipulations to what is given to the wife. A party may undoubtedly give legacies to strangers in a contract; and where it is clear that they are not in lieu of the other stipulations, they would be revocable, as if in a separate deed. But the provision here was a counter stipulation in favour of the husband's family, and irrevocable.

**LORD ALLOWAY.**—I am entirely of the same opinion, and differ from the Lord Ordinary on both points. The postnuptial contract was onerous on both sides, each party coming under certain counter obligations, one of which is this provision to the husband's children; and, besides, I do not think there is any evidence of an intention to revoke.

**LORDS JUSTICE-CLERK, ROBERTSON, and PITMILLY,** concurred.

*Purvis's Authorities.*—Nicholson, Dec. 16. 1806, (F. C.); Thomson, Dec. 1673, (3593); Grant, Jan. 10. 1679, (3596.)

**J. BAIRD, W. S.—N. W. ROBERTSON,—Agents.**

FREEMEN FLESHERS of CANONGATE, Suspenders.—*Moncreiff—Currie.* No. 451.

MAGISTRATES of CANONGATE, Chargers.—*Sol.-Gen. Hope—L'Amy—Horne.*

*Customs.*—Freemen Fleshers of the Canongate found entitled to exemption from certain dues; but the general right of the Magistrates to levy from unfreemen according to their tables reserved.

THIS was a process of suspension to have the Magistrates of Canongate, and the tacksman of their customs, prohibited from levying certain dues on cattle and flesh brought into the burgh by the members of the Incorporation of Fleshers. A proof having been allowed chiefly as to usage, the Lord Ordinary found the letters orderly proceeded as to a charge of twopence Scots on each cart-load established by acts of Parliament 1593, &c., in regard to which his Lordship considered that no exemption had been proved in favour of the suspenders; but, as to all the other dues, his Lordship found, 'that there was no warrant shown for such duties in any act of Parliament, and that no legal or sufficient evidence has been adduced to show that such duties have been immemorially levied,' and suspended the letters simpliciter. The Magistrates reclaimed, and contended that their general right to levy dues, according to certain tables, had been long established, and had been sanctioned by a decision of this Court, Wauchope, &c. 28th January 1800, (F. C.); and that the exemption on the part of the freemen fleshers had not been made out. The Court adhered, but without prejudice to any claims competent in law for duties against unfreemen.

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The Court were agreed that the suspenders had proved immemorial exemption, but that the interlocutor should not have proceeded on the want of power in the Magistrates generally to levy according to their tables.

GIBSON-CRAIGS and WARDLAW, W. S.—D. HORNE, W. S.—Agents.

No. 452.

T. HOWEY and COMPANY, Advocators.—*Baird*.  
 M. LOVELL and MANDATORY, Respondents.—*Moncreiff*—*Rutherford*.

*Public Carrier—Master and Servant.*—A waggoner, employed by public carriers who did not undertake to carry goods from intermediate places, having allowed a trunk to be put into the waggon on the road, his employers held not responsible for its loss.

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HOWEY and COMPANY were the proprietors of an establishment which had been carried on by them for many years, for the conveyance of goods, by means of daily post-waggons, between Edinburgh and Glasgow. In their advertisements they professed to carry goods between these two places, but without expressly declaring that they did not receive or deliver goods at any intermediate place between Edinburgh and Glasgow. It had been, however, their uniform practice, since their first establishment, not to receive or deliver goods at such places, the goods being packed up at Glasgow and Edinburgh, pressed down by a machine, and fastened so that it was impossible to remove one parcel, or add another, without undoing the whole load, which was never done except at the end of the journey; and a way-bill was made up for each waggon, and sent off every evening by the mail. It was also proved that goods coming from an intermediate place were always sent to Edinburgh or Glasgow to be there packed up; and, on the other hand, those deliverable at an intermediate place were carried on to the end of the journey, and then sent back by some other conveyance. The waggons thus packed up were conducted by waggoners, each of whom went only a single stage, in driving which he was limited to a certain time, and no person accompanied the waggon as guard or superintendent from the one town to the other. As one of these waggons was passing Gogar Mount, six miles from Edinburgh, about nine o'clock of an evening in October 1820, the gardener at Gogar Mount, and one Martin, keeper of an inn situated on that part of the road, stopped the horses, and asked the waggoner to carry to Glasgow a trunk which they had with them, belonging to Lovell, a stranger then on a visit at Gogar Mount; but the waggoner refused to receive it, saying he had no room, and drove his horses on. They, however, stopped them, and again pressed him to take it, and he at last said, 'Very well, if there is room, put it in.' They accordingly threw the trunk into an open space at the foot of the waggon, called the tail, used for carrying the horses' oats, and secured by a sort of railing at the end of the waggon; and it was deponed that the trunk 'was put in sufficiently secure to prevent its falling out, or any thing of that kind, had it not been taken out by hands.'



Nothing was paid to the waggoner, these men telling him that the carriage would be paid on delivery. Next morning the trunk, rifled of its contents, was found in a field by the road side, at a short distance from the place where it had been put into the waggon; whereupon Lovell raised an action before the Sheriff of Edinburgh for its value. The Sheriff having allowed a proof, which established the facts above stated, and having found Howey and Company liable, they presented a bill of advocacy, which was refused by Lord Pitmilley, but passed by the Court, (see ante, Vol. II. No. 98.) The expedite letters having come before Lord Mackenzie as Ordinary, Howey and Company contended, that as their engagement with the public was only to carry goods between Edinburgh and Glasgow, and not from any intermediate place, they could not be bound by an act of the waggoner in a matter beyond his authority, he being only intrusted to drive the waggon to the end of his stage, and not authorized to receive any goods or parcels by the way. On the other hand, it was maintained by Lovell, that Howey and Company being public carriers, their employment of a waggoner implied a mandate for receiving goods under the ordinary and known responsibilities of public carriers, unless private knowledge or public announcement of the special limitation were proved, and consequently that their servant having taken the trunk to be carried for behoof of his employers, who were to receive the remuneration, in the exercise of the powers universally committed to waggoners, they must be responsible for its loss. The Lord Ordinary advocated the cause, and assoilzied Howey and Company; and the Court, by a majority, adhered.

The LORD ORDINARY observed in a note—"The view which the Lord Ordinary has of this case is as follows:—The defenders set up an establishment of post-waggons, of which one purpose was the conveyance of goods from Edinburgh to Glasgow, and from Glasgow to Edinburgh, but not to or from all or any intermediate places. They never, so far as appears, during the long time they have kept up this business, gave any inducement to the public, either by advertisement or *rebus et factis*, to believe that they received goods into, or gave goods from their waggons upon the road in any way. On the contrary, every thing about the establishment was inconsistent with this; and in particular the attendance on the vehicles of a single waggoner only, who manifestly could not take any thing like a proper charge of receiving and giving out goods on the way, while he had his horses to attend to, as well as the manner in which the waggon was packed and secured, afforded evidence against it to all the world. In these circumstances, the pursuer could not well have been informed that the defenders' waggon

was one which would take his trunk in upon the road as part of its ordinary business. There is no evidence that he was told so, and the thing seems improbable. The probability is, that he had been told no more than the truth, that there was a waggon, the driver of which might be persuaded to take his trunk; and accordingly the men employed by him stopped the waggon in the dark, and in fact did persuade the waggoner, without authority, and in violation of his duty, reluctantly to take the trunk, or rather to let it be put in by them, the waggoner being actually unable to assist in putting it into the waggon. The pursuer says he did not know the limited nature of the waggoner's authority. But he had no sufficient grounds for believing that this authority was greater than in fact it was; and he does not say that he ever asked the waggoner whether he had authority to take goods in that way, and was so told by him. Indeed it is plain that the waggoner, so far from saying so, was very averse to admit the trunk. And, after all, it could not be, and was not, properly packed into the body of the waggon, but (the waggoner himself being unable to receive or place it) thrown by those that brought it into the tail of the waggon—a place obviously insecure, and exposed to theft when the waggoner was attending to his horses in front. In these circumstances, it seems to the Lord Ordinary that it would be too much to say that the defenders became liable to the pursuer by this transaction. It seems to the Lord Ordinary that the pursuer had no sufficient warrant, in the circumstances, for delivering his trunk to this waggoner, as authorized by the defenders, or any person, as owners of the waggon, to receive goods in that manner; and that if he did entertain any such idea, it was from carelessness, of which he himself must take the consequences."

**LORDS JUSTICE-CLERK, GLENLEE, and ROBERTSON** delivered opinions corresponding with that of the Lord Ordinary.

**LORDS ALLOWAY and PITMILLY** differed, and observed, that if a waggoner acts on the road according to the common duties of a carrier, he binds his employer, unless knowledge of the restriction by the party engaging with him be established, which was not attempted here, and could not be the case, as Lovell was a stranger; and that although practice of trade may be pleaded to determine the nature of a contract where there has been no special agreement, yet it could have no effect here, where a special contract was made with the waggoner.

*Advocators' Authorities*.—1. Bell, 373; Jeremy, p. 60; Watson, May 15. 1806, (F. C.) as reversed in House of Lords; (1. Dow, 48); Linwood, May 14. 1817, (F. C.); Duke of Roxburghe, March 1. 1822, (ante, Vol. I. No. ); Olive v. Eames, 2 Starkey, 181.

*Respondents' Authorities*.—Jeremy, p. 48; Cobden v. Bolton, (2. Campbell, 108); Butler v. Hume, (2. Campbell, 415.)

**G. TODD jun.—GIBSON-CRAIGS and WARDLAW, W. S.—Agents.**

A. CORRIE, Suspender.—*Whigham.*

No. 453

J. BARBOUR, Charger.—*Marshall.*

*Process—Expenses.*—A decree in an Inferior Court having been irregularly extracted, the Court remitted to hear parties, but found it incompetent to remit the question as to expenses incurred in the Court of Session.

CORRIE brought a suspension of a decree obtained by Barbour from the Steward of Kirkcudbright, on the ground that it had been irregularly extracted. The Lord Ordinary having suspended the letters simpliciter, Barbour reclaimed, and contended that this would have the effect of a *res judicata*, and so bar any claim for the debt in a new process, and therefore that the case should at all events be remitted to the Steward to proceed as if the decree had not been extracted. The Court recalled the interlocutor, found the charge irregular, and remitted to the Steward to proceed as if the decree had not been extracted; and having proposed to remit also the question of expenses, both in this and the Inferior Court, for his decision, it was objected by Corrie,—1. That such a remit as to the expenses in this Court was incompetent in a suspension;—and, 2. That, by the late Judicature Act, the Court were required to determine the matter of expenses. The Court being of opinion that the objections, and particularly the second one, were well founded, limited the remit accordingly, and found Corrie entitled to his expenses.

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Lord Eldin.

D.

R. WELSH,—W. DALEYMPLE,—Agents.

C. RUTHERFURD, Pursuer.—*Brown.*

No. 454.

J. BEVERIDGE and Others, Defenders.—*Baird—Coventry.*

*Judicature Act, 4th Geo. IV. c. 120.*—A party reponed without expenses against a decree pronounced in respect of his failure to lodge a condescendence, this having been occasioned by the fault of his opponent.

ON the 17th of December 1825, the Lord Ordinary appointed mutual condescendences by the parties in this case, the one for the pursuer to be lodged by the box-day in the recess, and that for the defenders on the third sederunt day in January then next. The pursuer having founded in his condescendence on a letter of material importance to the cause, but which he did not produce, the Lord Ordinary on the second sederunt day, and on the motion of the defenders, appointed 'the pursuer to produce the letter called for by the defenders within eight days,' and granted him a diligence for recovery of writings. No prorogation, however,

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Lord Meadow-

bank.

H.

for giving in the defenders' condescendence was moved for; and the pursuer did not lodge the letter for more than six weeks after the above order. The defenders having delayed to give in their condescendence till they had an opportunity of seeing the letter, the pursuer applied for and obtained decree in terms of the libel, with expenses, in respect 'the defenders have failed to apply for a prorogation of the term for giving in the condescendence on their part, within the period limited by the interlocutor ordering the same.' The defenders then reclaimed, and contended that it was by the fault of the pursuer, in not producing the letter on which he founded, that the delay had taken place, and therefore they were entitled to be reponed without expenses; and the Court, being of this opinion, recalled the interlocutor, and remitted to the Lord Ordinary to receive the condescendence, without payment of the expenses.

W. ROBERTSON,—R. WILSON,—Agents.

No. 455.

CLAUD CURRIE, Petitioner.—*More.*

P. JARDINE and Others, Respondents.—*Forsyth—Cockburn.*

*Sequestration of Land Estate—Process.*—The Court refused a petition for sequestrating a share of the general property of a party deceased left by a deed of settlement, as not sufficiently precise.

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M'K.

THIS was an application on the part of Currie for sequestration 'of the whole estates, heritable and moveable, real and personal, 'destined to the children, heirs and successors' of the late Mrs. Jardine, his mother, by a deed executed in 1816, (which directed a certain share of her whole property to be divided among her children,) pending a process of reduction raised by him of subsequent settlements, on the ground of his mother's insanity at the date of their execution. The Court, without determining the merits of the question, whether the circumstances were sufficient to warrant a sequestration, refused the petition *hoc statu*, on the ground that sequestration was demanded, not of a specific subject, but of a share of a general fund.

W. and A. G. ELLIS, W. S.—D. BROWN, W. S.—Agents.

EXECUTRIX of J. VANS AGNEW, Pursuer.—*Pyper*.  
EARL of STAIR and Others, Defenders.—*A. Bell*.

No. 456.

*Expenses prior to Appeal*.—ON deciding the case mentioned ante, Vol. IV. No. 379, the Court delayed determining the claims for expenses in the several branches of the litigation. These were, on the part of Agnew's executrix, for the expenses incurred in the question of reduction prior to the appeal, and in the discussion as to the removing, (see ante, Vol. III. No. 171,) and on the part of the Earl of Stair, &c. for those in the question of bona fides. The Court found expenses due to neither party.

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2d DIVISION.  
Lord Mackenzie.  
B.

Their Lordships were generally of opinion, that as in the reduction the House of Lords had the whole question before them, and did decide it out and out, they might have judged of expenses, (in which this case differed from that of *Maberly*, ante, Vol. IV. No. 362); but as they did not award them, this Court was not warranted in now doing so, especially as the judgment reversed had been pronounced unanimously; and as to the other expenses, that those in the removing, and the question of bona fides, might properly be set off against each other.

J. B. GRACIE, W. S.—J. BELL, W. S.—Agents.

J. SWORD, Suspender.—*Robertson*.

No. 457.

HOWDEN and GARDNER, Chargers.—*Montcith*.

*Bottomry—Bill of Exchange*.—A party having taken a bill of exchange for a sum advanced for repair of a vessel in a foreign port, and thereafter taken a bond of bottomry in further security of the same sum, held that the bond was null, and that the party was entitled to recover on the bill.

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2d DIVISION.  
Bill-Chamber.  
Lord Robertson.  
B.

THE brig Catherine of Leith, belonging in part to Sword the suspender, having required repairs while at Maranham in South America, the money necessary for the purpose, amounting to £299, was advanced by Johnson and Company, merchants there, to whom the master granted a bill of exchange for the amount, dated 17th August 1825, drawn on the suspender. On the 18th the vessel sailed; but, having been damaged at sea, she was obliged to return to Maranham, and undergo considerable additional repairs to the extent of £667, which sum was in like manner advanced by Johnson and Company, but on security of a bond of bottomry; and the master at the same time granted a similar

bond in further security of the £299 contained in the bill of exchange, it being stipulated that, if the bill were paid, the bond should become void. Both these bonds were dated the 2d of November, and bore 10 per cent. interest. By letter of advice from Johnson and Company, their agents in this country were directed to insure £700 advanced to the Catherine on bottomry, and £100 more, as the amount of interest which would be payable was uncertain. An insurance was accordingly effected to the extent of £800; and the Catherine having been lost on her voyage home, the amount was recovered by Johnson and Company's agents, and it was admitted that it exceeded by £45 the whole sum advanced for the second repairs, with interest and expenses. The bill for £299 had previously been accepted by Sword, who, having been charged for payment at the instance of Howden and Gardner, indorsees, but standing in the same situation with Johnson and Company, presented a bill of suspension, on the grounds,—1. That, having taken the security of a bond of bottomry with maritime interest, Johnson and Company must be held to have relinquished the bill, and betaken themselves to the bond, as otherwise they would hold a double security, and have stipulated for maritime interest without the risk, whereby the contract would necessarily fall as usurious;—and, 2. That the insurance covered both bonds, and consequently that the bill must be held to be at least partially extinguished by the amount recovered from the insurance office, which the holders were bound at all events to apply proportionally to the extinction of both bonds. To this it was answered, that the bond for the £299 was null, as having been taken after the money had been already advanced on the credit of a bill, and consequently that they could not have drawn maritime interest, and did not claim it, and that the insurance could not cover a null bond, which was not an insurable interest, and had not in fact been insured; and as to the £45 of excess received from the insurance office, that a claim of repetition still lay at the instance of the office. The Lord Ordinary refused the bill, and the Court, while they passed it to the extent of £45, adhered quoad ultra.

**LORD GLENLEE.** — I have no idea that parties taking an useless bond of bottomry thereby lose the original debt for which a bill has been already granted. If there was any appearance of the allegation being well founded, that the chargers insured and recovered on that bond, that would alter the case. But all they received seems to have been under an insurance on £667, although they certainly got more than their interest under that bond. I can see no harm, however, in passing to the extent of £45.

**LORDS JUSTICE-CLERK, ROBERTSON, and PITMILLY** concurred.

**LORD ALLOWAY.**—I have some doubts, in consequence of the insurance office having paid more than the interest of the party effecting the insurance, according to their statement of the insurance being only on the one bond; and before throwing the case entirely out of Court, I should wish to see the policy, to have this matter cleared up, especially as caution is offered.

*Charger's Authority.*—Holt, p. 236.

**J. TAYLOR, — T. GRAHAME, W. S. — Agents.**

**J. DIXON and Others, Suspenders.**—*Moncreiff—Skene.*  
**Honourable Admiral FLEMING and Others, Chargers.**—*Sol-Gen. Hope—Jardine.*

No. 458.

*Road Acts.*—Held that part of an old parish road, intersected by a new turnpike road, having been assumed and kept in repair by the trustees of the turnpike road in virtue of their powers under a local act, must be held to be turnpike, to the effect that carriages, &c. going 100 yards along it, and merely crossing the turnpike road, may be subjected in toll, notwithstanding the clause of exemption in the general road act, in the same way as if they had travelled along the turnpike road itself.

By a local act (1. Geo. IV. c. 8.) for making a road from Cumbernauld in Dumbartonshire to Duneton near Carlisle, it is provided that the trustees shall have power to erect gates on the side of the new road, or across any part of 'any of the lanes or 'ways leading out of or into' it, and to levy tolls there, but so as that a ticket received at any such side gate or bar shall entitle the receiver to pass toll free through the next gate on the road, if within five miles,—the trustees always repairing and maintaining out of the tolls so levied the space between such side-bar and the main road. This road passes within a short distance of the town of Airdrie, near which are situated certain coal and iron works belonging to Dixon and others, who have access to Airdrie from their works by an old parish road, which the new road intersected. On this parish road the trustees erected a bar at about three quarters of a mile from the point of crossing, and in terms of the statute completely repaired it, and continued to maintain it between the side-bar and the main road, and at this bar they commenced to levy tolls from the carts of Dixon, &c. in going from their works to Airdrie. Dixon, &c. on this brought a suspension and interdict, on the ground that they merely crossed the turnpike road, and that by the general road act (4th Geo. IV. c. 49.) no person is liable in payment of toll who 'shall only cross any turnpike 'road, or shall not pass above 100 yards thereon;' and they con-

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 Lord Cringletie.  
 F.

tended that the permission to erect side-bars was merely intended to prevent evasion by persons travelling more than 100 yards along the main road, but not to warrant the levying toll from persons making no use of it whatever. To this it was answered by Admiral Fleming, &c. the trustees, that the side-bar in question was necessary to prevent evasion, and that the portion of the cross road which they had assumed and maintained in virtue of their local act must be considered as part of the trust road; and being more than 100 yards in length from the main road to the side-bar, the suspenders did in reality travel 100 yards on the turnpike road, in terms of the general act. The Lord Ordinary repelled the reasons of suspension, and the Court by a majority adhered.

The LORD ORDINARY observed in a note—"By a clause in the local act, any person paying toll at the bar on the cross road leading into the great one, is entitled to pass through the next gate on the great road toll free, if that gate happen to be within five miles of the other on the cross road, which proves that the latter road was assumed as a part of the great one, and placed under the same regulations which applied to it. The very purpose of giving such a power to the trustees to assume lanes or ways leading into the great road, or any part thereof, was to enable them to prevent evasion of the tolls on the great road, and it cannot be presumed that the trustees will assume any roads but such as are necessary for that purpose. The suspenders argue that the statute does not give a power to erect such bars across the side-roads, when the statute gives this power in the most direct and positive words, so as he that runs may read. It is only the general turnpike act which affords them the least foundation for their plea. But the general turnpike act does not apply in this case, because it is admitted that the passenger, after paying duty on the Rawyards road, travels nearly three fourths of a mile on it before he reaches the great road. As to the toll-bar being necessary to prevent evasion, a person has only to look at the chart in process to see that it is placed at a point where another road diverges and leads into the great road. Perhaps it is a hardship on those using the Rawyards road exclusively to pay toll-duties; but the Canale road has been considered by Parliament as a great and useful national measure, to carry through and support which, extraordinary powers and means were given. The suspenders ought to have opposed these in Parliament, if they thought them excessive; for if the trustees do not exceed them, the Lord Ordinary can give them no relief; and it appears to him that, under a just construction of the statute, no excess has been committed."

LOKDS JUSTICE-CLERK, ROBERTSON, PITMILLY, and ALLOWAY concurred in the opinion of the Lord Ordinary.



**LORD GLENNIE.**—The new road intersected the old parish road, so that parties going along it cannot help crossing the former; and I confess I do not understand how the trustees, by assuming part of the old road, can oblige persons going along it to pay them toll, as if travelling the new road. Suppose they chose to assume 100 yards of a mill road leading nowhere but to the mill, could they levy toll from carts going to and from the mill? or if a person had a farm between the side-bar and the junction with the main road, but 100 yards from the bar, could they levy toll from him, though he did not even cross their road? I have very great doubts if they could, and yet this would follow from holding the road assumed by them to be in exactly the same situation with the main road. If the procedure adopted by the trustees were absolutely necessary to prevent evasion by persons actually using the new road, it would be a favourable plea for them; but I can see no necessity for that, as evasion might easily be prevented by a bar in another situation, and the interdict craved here is not against the bar erected, but only against the trustees levying toll at it, from persons doing no more than crossing their road.

**MACK and WOTHERSPOON, W. S.—J. HOPE, W. S.—Agents.**

**J. INNES, Suspender.—Skene—Innes.**

**No. 459.**

**G. PARTRIDGE or PARLINGER, and R. R. HEPBURN, Chargers.  
—Gillies.**

**Title to Pursue.**—Held that a tenant who had right to the game on his lands, and to appoint gamekeepers, was entitled to insist in a suspension and interdict against a party shooting on the lands, although his lease had been reduced by the Court of Session; but the judgment was under appeal, and he was still in possession.

**MR. INNES** possessed the entailed estate of Durriss, comprising the whole parish of that name, on a long lease from the late Earl of Peterborough, and by which the exclusive right of shooting and hunting upon the property was conveyed to him, and authority given to him to name gamekeepers. Of this lease an action of reduction was brought by a succeeding heir of entail, and decree was pronounced, against which an appeal was entered. During these proceedings Mr. Innes presented a bill of suspension and interdict against Partridge or Parlinger, gamekeeper of Mr. Hepburn, a neighbouring proprietor, who, he alleged, had without his permission hunted and killed game upon certain parts of the lands of Durriss. The bill having been passed, Partridge objected that Mr. Innes had no title to insist, seeing that the lease had been reduced. To this Mr. Innes answered, that the decree was

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Lords Alloway  
and Eldin.**

under appeal, and that as he was still in possession, and liable for the rents, he was entitled to protect the property. Lord Alloway, in respect that the suspender has produced a title by his lease to protect the game, and to appoint gamekeepers upon the whole estate of Durris, which comprehends the whole of the parish of Durris, and in respect that the charger, as in right of Mr. Hepburn, has shown no right whatever to any lands in the parish of Durris, but, on the contrary, Mr. Hepburn's title by the retour produced extends only to lands situated within the parish of Fetteresso, suspended the letters, and granted the interdict craved against the charger George Partridge or Parfingier, and all others his followers, not having leave and permission from the suspender against hunting, shooting, or killing game on the hills and grounds in question, lying in the parish of Durris, and upon all other lands lying in the said parish of Durris. Thereafter the decree of reduction having been affirmed, Partridge represented, and contended that Mr. Innes' title was now entirely destroyed, and Lord Eldin thereupon recalled the interlocutor, and in respect that the suspender has no right to challenge the claims of the respondents upon the estate of Durris, found him liable in expenses, but found it unnecessary to give any judgment upon the principal question at issue. The Court, however, altered so far as regarded expenses, and decerned for them in favour of Innes.

The Court were unanimously of opinion, that as Mr. Innes was in possession of the lands under a title which was not finally reduced, and was liable for the rents, he had a right to protect the game, and therefore that he had a title to present the bill of suspension; and although it was now unnecessary to decide the merits, yet the suspension was well founded, and he was therefore entitled to expenses.

T. INNES, W. S.—J. KER, W. S.—Agents.

No. 460.

A. G. FRASER, Pursuer.—*Shemo—Robertson.*

A. MORRICE, for the ABERDEEN BANKING COMPANY, Defender.  
—D. of F. Cranstoun—Lumsden.

*Partnership—Bank Dividends—Interest.*—Circumstances in which it was held that a Bank was not liable in interest on arrears of dividends of a share of the stock.

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Lord Eldin.

D.

The late Alexander Fraser of Grenada, the father of the pursuer, held one share of the stock of the Aberdeen Banking Company. He died in 1807, leaving a testament, by which he be-

bequeathed his property to five executors, (some of whom resided abroad,) for behoof of his three natural sons, of whom the pursuer was now the survivor. At this time the value of the share did not exceed £500. The executors proved the will in Doctors Commons, and obtained a confirmation in Scotland, and in 1800 they caused their agent to write to the cashier of the Bank on the subject of the share belonging to Mr. Fraser, and the dividends due upon it. By the fifth article of the contract of copartnership of the Bank, it is declared, that 'in case any share, upon the death of a partner, shall fall to more than one person, it is hereby provided, that those who may succeed thereto or by succession shall be obliged, within six months after the death of such partner, to convey the same to any one of the persons succeeding thereto; or to any other person for their behoof that they may incline, who, on the transference thereof, shall be fully vested in the right of said share; but, failing their doing so, it was declared that the Directors might sell the share by public roup, and be accountable for the proceeds without interest. In answer, therefore, to the communication from the executors, the cashier stated, that it was necessary to confirm the share and dividends, and that, before any of the bygone dividends can be paid, the share must be transferred to one of the executors, and for that purpose, the others must give a power of attorney to some person as their agent here to make the transfer in the Bank's books; when this is done, the dividends will be paid.' No further application was made to the Bank on the subject, and in 1822 the Directors caused advertisements to be inserted in the London and Edinburgh Gazettes, calling on the heirs of Mr. Fraser to come forward and claim the share which had belonged to him. In consequence of this, a claim was made by the pursuer; and the Bank being satisfied of his right, they transferred the share to him, which was now worth £2350, and he further received £1000 of dividends. In addition to this, however, the pursuer further claimed periodical interest upon bygone dividends, which he rested upon the ground,—1. That it was due *ex lege*; and that, at all events, it was due *ex mora*, as intimation had been given of the right of the executors in 1809, and the Bank ought then to have paid the dividends;—and, 2. That the Bank had traded with the dividends, and made profit of them, and consequently were liable for the interest of the fund so employed by them. To this it was answered,—1. That, by the practice of Banks in general, no interest is allowed on bygone dividends, and that such practice formed a part of the law of merchants.—2. That by the contract of copartnership the Directors might have sold the share, in which event they were only

to be accountable for the proceeds without interest, and which necessarily implied that interest was not to be due upon any part of a partner's stock, or on the dividends payable on that stock;—and, 3. That the alleged intimation in 1809 could not have the effect to make the Bank liable in interest,—the more especially, as the measures required by the contract were not adopted for conferring a right to uplift the dividends. Lord Alloway appointed certificates to be produced 'with regard to the practice of other banks or banking companies, as to allowing or not allowing interest on bygone dividends, from the time the same are declared, until they are paid to the proprietors or partners respectively.' Several certificates having been produced, showing that it was not the practice to allow interest, Lord Eldon assuaged the defender. On a representation by the pursuer, however, he altered, and returned against the Bank, but thereafter recalled his interlocutors, and reported the case to the Court; and their Lordships, on advising Cases, unanimously assuaged the defender.

**LORD BALGRAY.**—By the practice of bankers, no interest is allowed on bygone dividends; and this being part of the law of merchants, we must be governed by it. If a party wish his dividends to bear interest, he should get them transferred to his cash account. Such is the general rule; and the only question which remains is, whether any circumstance has occurred to create an exception to it. I think that there has not, no step having ever been effectually adopted to get the dividends transferred; and the Bank did even more than their duty, by inserting the advertisements in the *Gazettes*.

**LORD CRAIGIE.**—Independent of the practice, I think that, in point of justice, there is no ground for this demand.

**LORD PRESIDENT.**—When dividends fall due, they may be called for at any time; and therefore we must hold that they are ready to be paid on demand; so that it would be unjust to make the party liable in interest. Accordingly, the dividends upon Government securities do not bear interest.

**LORD GILLIES.**—If there has been any more at all, it has been on the part of the pursuer, and not on that of the Bank.

*Pursuer's Authorities.*—Parkhill, June 25, 1748, (550); Dawson, June 15, 1806, (F. C.); Garthland's Trustees, May 26, 1820, (F. C.); Hill, May 25, 1821, (ante, Vol. I. No. 36); Carron Company, 1817, (not rep.)

*Defender's Authority.*—Davies v. Carron Company, 1816, (not rep.)

D. M'INTOSH, W. S.—J. TURNER, W. S.—Agents.

No. 461.

On JEFFREY, Suspender:—*Cunninghame*.Mrs. MATHESON and HUSBAND, Chargers:—*Sol.-Gen. Hope—Forsyth*.

*Legal Diligence—Husband and Wife—Bill of Exchange*.—Circumstances in which a charge, at the instance of a married woman, on a bill granted to her pending the marriage, was suspended.

By the deed of settlement of the late Mr. Matheson of Attadale, his son and heir was burdened with a provision of £300 in favour of the charger, his sister. For this sum, after she was married, he granted his acceptance to her. When it was about to fall due, an arrangement was entered into, by which she indorsed the bill to Jeffrey, who granted her his own bill for the amount, payable at 12 months date. Having failed to pay it, a charge was given at her instance alone to Jeffrey, who thereupon suspended, on the ground,—1. That the charge was inept, as it was at the instance of a married woman, without the concurrence of her husband, and that the bill on which it was founded belonged to him *jure mariti*;—2. That no value had been given to him for the bill, seeing that it had been granted in consideration of the original bill, which had been indorsed by the charger without the concurrence of her husband, and therefore could not vest in him any effectual right;—and, 3. That the nature of the arrangement was, that the original bill should be transferred to him in trust, so that it might not be attached by the creditors of her husband, who was in bankrupt circumstances; and in evidence of this he referred to several letters which had been written by the husband to his private agent. The husband having sisted himself as a party, it was answered,—1. That the objection to the charge was thereby obviated;—and, 2. That the bill having been granted in consideration of the original one, the suspender had thereby substituted himself as debtor in place of Matheson, the acceptor of the first bill, and the allegation of trust was denied. The Lord Ordinary suspended the letters simpliciter, and the Court, in the special circumstances of the case, adhered.

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S.

*Charger's Authorities*.—Hepburn, Jan. 29. 1702, (6047); 1. Ersk. 6. 23.

R. ROY, W. S.—J. STEWART,—Agents.

No. 462.

Mrs. WAUCHOPE, Suspender.—*Anderson*.  
T. STEPHENS, Charger.—*Dundas*.

*Landlord and Tenant—Interdict—Removing—Held incompetent, to interdict a tenant from making use of the subjects let to him, on the allegation that he is notour bankrupt, and an action of removing has been raised against him.*

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1st DIVISION.  
Bill-Chamber  
Lord Medwyn.  
S.

Mrs. WAUCHOPE presented a bill of suspension, stating that she had let her coal-works to Stephens,—that he was in arrear of rent, and she had brought an action of removing against him,—that he was notour bankrupt, being actually in prison, and that, notwithstanding he was unable to pay any rent, he was working and carrying off the coal, and she therefore prayed for interdict. The Lord Ordinary refused the bill, 'in respect that it is incompetent, at the very commencement of an action for removing a tenant, to apply for an interdict against his occupying the subject of the lease, without some stronger allegations as to waste or dilapidation than seem to be made against the respondent; reserving to the suspenders to apply by petition to the Judge Ordinary to have a manager of the coal-works appointed, who shall be accountable to the Court for his intrusions during his management, on the ground that the respondent is a notour bankrupt, and actually in jail, and so incapable of giving his personal superintendence to the working of the coal;' and the Court adhered.

W. MACKENZIE, W. S.—J. TAYLOR,—Agents.

No. 463.

CAMPBELL, Suspender.—*Skene*.  
FOTHERINGHAM, Charger.—*Rutherford*.

*Process—Letters of Suspension.*—Letters of suspension dismissed as incompetent, and not to be remedied by amendment, on the ground that the date of the letters was not that of the passing of the bill; and this objection held to be good, and not barred by its not having been stated till after considerable proceedings had taken place in the preparation of the cause.

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Lord Cringletie.

LORD CRINGLETIE reported, that in a process of suspension depending before him, after the cause had been prepared so as to be in a situation to close the record, the charger had stated an objection to the validity of the letters, that they bore to be dated the 6th of 'June,' instead of the 6th of 'July,' the latter being the true date of the passing the bill, which was always taken as the date of letters, so that the letters, it was contended, were without a warrant, there being no bill passed of the date which

they bore; and his Lordship consulted the Court on these two points,—1. Whether the objection inferred a nullity not remediable by amendment;—and, 2. Whether the charger was barred from stating it after having joined issue, and proceeded so far in the preparation of the cause. The Court directed his Lordship to sustain the objection, and dismiss the process, but to find no expenses due.

The Court were of opinion, that although the objection appeared of a frivolous nature, it must be sustained, as depending on an established point of form, from which it might be dangerous to depart;—that it was *pars judicis* to notice it, and, as inferring an absolute nullity, could not be got over by a plea of personal exception,—and that the Court could not authorize an alteration of the signet letters, so as to correct the date.

A. ANDERSON, Pursuer.—*D. of F. Cranstown—Sandford.*

No. 464.

MAGISTRATES OF LINLITHGOW, Defenders.—*Cockburn—*

*A. Wood.*

*Implicit Obligation.*—The Magistrates of a burgh being bound to support the tacksmen of their customs in prosecuting for payment of dues 'on a representation made to them for that purpose, and having their sanction;' and having received an intimation under protest of the tacksmen's intention to prosecute for certain dues, and calling on them to support him—Held that their returning no answer to such protest did not infer a sanction of the prosecution, and liability for the expenses.

THE Magistrates of Linlithgow let to one White the town and bridge customs of the burgh, according to a certain custom table, and use and wont; and bound themselves in the articles of roup, 'upon a proper representation made to them for that purpose, and having their sanction and approbation, to support the tacksmen and his cautioners in prosecuting for and procuring payment of said customs, levied according to use and wont, before the Judge Ordinary;' but providing, 'that in the event of the decision of the Judge Ordinary not sustaining the tacksmen's claims for payment of such customs, the Magistrates and Council shall not be bound to support and prosecute such claims before any Superior Court, unless they shall see cause so to do.' Shortly after White's entry, the Union Canal Company refused to pay certain dues, which had the previous year amounted to a very considerable sum, and on this he, along with Anderson and Nimmo, his cautioners, served a protest on the Magistrates and Council, intimating to them their intention of raising

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2d DIVISION.  
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an action before the Sheriff for payment of these dues, and calling on the Magistrates to support them in prosecuting the same, and protesting that if they failed so to do, they should be liable in all damages and expenses. The Magistrates returned no answer to this protest, and the action was raised; but the Sheriff decided against the claim for duties. Thereafter the Provost and Treasurer, (it was averred,) at a meeting held regarding this matter, agreed, on behalf of the Town, to bear one half of the expense of an advocation, and directed the tenant and his cautioners to present a bill, while, on the part of the Magistrates, it was alleged that the Provost and Treasurer had merely, in their individual capacity, agreed to use their endeavours with the Council to obtain their consent to bear a share of the expense; but, in a letter from the Provost, produced in process, he observed, 'As to any thing that passed respecting the sum meant to have been contributed by the Magistrates, on condition of the above action being carried into the Court of Session by White and his cautioners, you must be fully aware, that as they failed to perform this condition, they cannot possibly have any claim against the Magistrates on that head.' A bill of advocation was thereafter presented, but was refused, in respect of no caution having been found. On this, Anderson, one of the cautioners for the tacksman, and who had advanced the expenses in these proceedings, brought an action against the Magistrates for payment, on the ground, that by not answering the protest and intimation, and by afterwards consenting to the advocation, the Magistrates must be held to have sanctioned the action, in which the obligation in their articles of roup obliged them to support the tacksman; and as to the advocation, it was offered to be proved, as above stated, that it was expressly sanctioned by the Provost and Treasurer. The Lord Ordinary found the pursuer's allegations 'not relevant to infer that the Magistrates and Council of Linlithgow either agreed, or were in mala fide in not agreeing, to support the pursuer in his action before the Sheriff, or that they agreed to bear half the expense of the proceedings by advocation to this Court; and further, that, supposing they had agreed to bear part of these expenses, yet the pursuer's failure to find caution, whereby the bill of advocation was refused, and the proceedings were rendered nugatory from the first, would be sufficient to liberate them from this obligation;' and therefore absolved the defenders, with expenses; and the Court by a majority adhered, except as to expenses, which they found due to neither party.



**LORD JUNCTION-CLARK.**—There is no appearance of any representation having been made to the Magistrates in terms of the articles of roup; and although they ought to have answered the protest, their not doing so does not infer a sanction of the Inferior Court process. As to the advocacy, it is very different; and it is only from the form of the action being against the Magistrates, and not against the Provost and Treasurer individually, that I think decree cannot be given for these; for the plea of no caution being found is a very flimsy evasion. It is clear, however, that in a case of this character they are not entitled to expenses.

**LORD ALLOWAY.**—An absolute warrandice arose from the contract, binding the Magistrates to vindicate the customs; and as I conceive that the Provost and Treasurer bound the Town in agreeing to the advocacy, I must consider it as a sanction of the previous proceedings before the Inferior Court, and I am therefore inclined to alter.

**LORD GLENLEE.**—I think the interlocutor is right. The summons is not for indemnification for want of the subject let, but is laid on the special agreement, and to support the claim, the consent of the Magistrates was necessary. The protest is a declaration of a resolution to raise the action, without having yet received the sanction of the Magistrates; and I have no idea that their not answering it was sufficient to make them liable.

**LORDS ROBERTSON and PITMILLY** concurred.

*Pursuer's Authority.*—Irving and Co. Feb. 12. 1807, (F. C.)

**J. B. WATT,**—**INGLIS and WEIR,** W. S.—Agents.

**LORD GLAMMIS, Pursuer.**—*A. Wood.*

No. 465.

**EARL OF STRATHMORE'S TRUSTEES.**—*Fullerton.*

*Entail—Heir-Male.*—Circumstances under which it was held, that a party who had made up titles under an entail, as heir-male of his father, who was alive, and as called exclusive of him, and where the right of such heir-male was excluded from the succession for thirty years, was not entitled to payment of the expenses of making up titles from the trust-estate of the entailor.

**THE** late John Earl of Strathmore held the family estates of Glammis and others in fee simple. On the 15th of December 1816 he executed a deed of entail,—a deed of nomination of heirs,—and a trust-deed, all referring to each other. By the deed of entail he disposed the lands to himself and the heirs of his body, 'whom failing; to any person or persons to be named 'by me in any nomination or other writing to be executed by me 'at any time of my life;' and he provided 'that the heirs-male 'of my body, and all my said heirs of tailzie, shall be holden and

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' obliged to obtain themselves thence, and entered with the super-  
 ' riors of the said lands and estate, and infeft and raised therein;  
 ' and he bound them to cause the deed to be recorded within six  
 ' months after his death. By the deed of nomination he stated,  
 ' that ' being resolved to exclude the Hon. Thomas Bowes, my  
 ' only surviving brother-german, and John Lyon of Hatton  
 ' House in the county Palatine of Durham, and Charles Lyon,  
 ' his brother, from ever succeeding to my said estates, it is pro-  
 ' per that I should execute the deed of nomination and appoint-  
 ' ment after written, do therefore hereby declare and appoint,  
 ' that in case of the failure of heirs whatsoever of my body, and  
 ' the heirs of their bodies, my said lands and estates shall devolve  
 ' and belong to the heirs-male lawfully procreated or to be pro-  
 ' created of the body of the said Thomas Bowes successively in  
 ' their order, according to their respective seniorities, and the  
 ' heirs-male respectively to be procreated of their bodies succe-  
 ' ssively; whom failing, to the persons having right for the time  
 ' to the titles, dignities, and honours of Earl of Strathmore and  
 ' Kinghorn, and any other titles, dignities, and honours enjoyed  
 ' by me, other than and except the said Thomas Bowes, John  
 ' Lyon, and Charles Lyon, all and each of whom are hereby spe-  
 ' cially excluded and debarred from ever succeeding to or enjoy-  
 ' ing the said lands and estate.' By the trust-deed he conveyed  
 ' his whole estates to the defenders, for the purpose, inter alia, of  
 ' payment and satisfaction of all obligations, legacies, &c., granted  
 ' or to be granted by me, &c., or which I shall declare to be a  
 ' burden upon the Scotch estates;' and he further declared,  
 ' That this trust shall subsist till all the debts, legacies, donations,  
 ' and others payable out of my Scotch estate as aforesaid shall be  
 ' paid and extinguished, and for the space of thirty years, from  
 ' the day of my death, and until the death of the longest liver or  
 ' survivor of the said Thomas Bowes, and of John Lyon and  
 ' Charles Lyon, and immediately after the expiry of thirty years  
 ' from the day of my death, and after the death of the longest  
 ' liver or survivor of the said Thomas Bowes, John Lyon, and  
 ' Charles Lyon, and whenever the said debts, &c. shall have been  
 ' paid as aforesaid, this present trust shall fall and become ex-  
 ' tinct;' and the trustees are then authorized to convey the estates  
 ' to any child of Thomas Bowes who shall be then alive, whom  
 ' failing, to the person having right for the time to the titles of  
 ' Earl of Strathmore. It was also declared, 'That the discharged  
 ' account of the expense of executing this trust, or of recording  
 ' the aforesaid entail and nomination, paid by their order, or the  
 ' disbursers thereof, or an account under the hand of any of my

'said trustees; if they are disbarbers thereof themselves, shall be 'a sufficient abatement of such expenses.' On the death of the Earl without issue, the trustees were infeft; and the pursuer, Lord Glamis, who was the eldest son of Thomas Bowes, now Earl of Strathmore, obtained himself served 'propinquior et legitimus hæres masculis talis et provisionis dict. quond. Joannis Bowes Lyon, Comitis de Strathmore, &c., virtute dispositionis et instrumenti talis per eum execut.' &c. Under the retour of this service he made up titles to the estates, and he then brought an action against the trustees, concluding for payment of the expense of so doing. In defence it was stated,—1. That as the estates were vested in them for thirty years, and they were only to be conveyed by them to the heir-male of the body of Thomas Bowes on the lapse of that period, and after his death, the pursuer had acted prematurely in making up titles, as he might then not be alive.—2. That the titles were in themselves inept, because the destination was to the heir-male of Thomas Bowes, which necessarily presupposed his death, whereas he was still alive; and although the pursuer was his eldest son, yet he could not be characterized as his heir-male until his father was dead;—and, 3. That although there was an obligation on the heirs of entail to obtain themselves timeously infeft, yet this referred to the period of their succession, which could not take place for at least thirty years, and there was no obligation on the trustees to pay these expenses. To this it was answered,—1. That the deed of entail came into operation immediately on the death of the Earl, and as he died without issue, and had excluded his brother, the pursuer was the person entitled to take under the entail; and that although he was there described as heir-male, yet this was synonymous with eldest son, and therefore he was called on immediately to make up titles to the estate;—and, 2. That by the terms of the trust the trustees were bound to pay all the expenses attending the completing of titles to the estates, and therefore he ought to be indemnified for those which he had incurred. The Lord Ordinary asswizied the defenders, but found no expenses due; and the Court adhered.

The Court were of opinion, that the pursuer could not be characterized as heir-male of his father, who was still alive; that the fee was full by the infeftment of the trustees; and that it was not requisite for the pursuer to make up titles till the succession opened to him.

G. VERRILL, W. S.—J. DUNBAR, W. S.—Agents.

No. 466.

N. W. ROBERTSON, Suspender. ~~Moore~~ ~~Shaw~~R. STRACHAN, W. S., Charger. ~~Fallick~~

*Stat. 25, Geo. III. c. 80.—Attorney License.*—Held that an agent, who had failed to take out his attorney license during the dependence of an action, in which he obtained decree for expenses in his own name, was not entitled to recover them from the party against whom the decree was pronounced.

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Lord Eldon.

D.

CAMPBELL, as assignee of Robertson, raised an action in October 1823 against Mrs. Ferrie, for whom Mr. Strachan, writer to the signet, appeared as agent. On the 4th of July 1824 she obtained absolvitor, with expenses, and decree for these expenses was issued in name of Strachan. On this decree he raised diligence, against which a suspension was presented by Robertson in name of Campbell, on the ground, that during the dependence of the litigation, Strachan had not taken out his attorney certificate in terms of the 25th Geo. III. c. 80. A few days before the suspension was presented, Strachan having got notice of the objection, paid to the Stamp-office the arrears which were due; and the Lord Ordinary on the Bills, in consequence of this, refused the bill; but the Second Division, after sisting Robertson as a party, remitted to pass it. (See ante, Vol. III. No. 864.) The letters having been expedite, it was contended on the part of Strachan,—1. That he was in fact the assignee of Mrs. Ferrie, and that, in a question with her, Robertson could not resist payment of the expenses;—and, 2. That as the statute was made for revenue purposes, and as he had paid all the arrears, he was entitled to recover the expenses. To this it was answered,—1. That the charge was at the instance of Strachan, not as assignee of Mrs. Ferrie, but as agent in the cause;—and, 2. That the statute required that the certificate should be taken out prior to the commencement of any action in which the party acted as agent; that it was not granted by the Stamp-office, where only the stamp paper was procured, but that it was granted by the officer of Court appointed for the purpose; that its effect was prospective, so that the payment of the arrears could not place the agent in the situation as if he had been in possession of his certificate during the dependence of the action; and that the statute expressly declared, that if he acted as agent without having obtained such certificate, he should be 'in-scapable to maintain or prosecute any action or suit in any Court of Law or Equity, for the recovery of any fee, reward, or dis-bursements, on account of prosecuting, carrying on, or defend-ing any such action, suit, or proceeding.' The Lord Ordinary suspended the letters simpliciter, and found expenses due; and

the Court, after taking time to consider, sustained the personal objection to Mr. Strachan, reserving any claim at the instance of Mrs. Ferrie, and, quoad ultra, adhered.

The Court were of opinion, that the objection as against Mr. Strachan was well founded, but that as it was one personal to him, it could not affect the claim of Mrs. Ferrie for payment of the expenses which she had incurred in defending herself.

N. W. ROBERTSON,—T. B. FERRIE, W. S.—Agents.

T. FRASER and A. BARNETSON, Pursuers.—*Sol.-Gen. Hope.* No. 467.  
J. REID, Defender.—*Skene.*

*Personal Objection—Citation.*—A party held barred from objecting to the irregularity of a citation, by having written to the messenger, acknowledging that he had duly received it.

REID having brought an action of damages against Fraser, Barnetson, and Andrew, which was remitted to the Jury Court, the two former raised an action of reduction and improbation of the execution of the summons. In support of this, they founded on various alleged defects in the citation copies which had been served upon them. To this it was answered, *inter alia*, that Fraser had addressed a letter to the messenger on the day on which the summons was served, stating that ‘I acknowledge to have received from you this day two summonses at the instance of Mr. John Reid, viz. the one a summons of interdict, and the other a summons of damages;’ that in like manner Barnetson wrote to the messenger, that ‘I have now received copies summons from you at the instance of Mr. John Reid against Mr. Andrew of Aohater and me, and you are hereby authorized to return your execution as personally apprehended.’ It was therefore contended that the pursuers were barred *personali exceptione* from objecting to the citations. The Lord Ordinary, ‘in respect of the letters from the two pursuers Fraser and Barnetson produced, found that they are barred *personali exceptione* from objecting to the execution of the summons of damages at the instance of the defender John Reid against the above pursuers, and the pursuer John Andrew, who has disclaimed the process;’ and therefore repelled the reasons of reduction, and assolized the defender; and the Court, upon the same ground, adhered.

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D. CLYNE,—C. SPENCE,—J. JAMIESON,—Agents.

No. 468.

R. MUNGALL, Petitioner.—*Alison*.

*Records of Court.*—The Court, of consent of creditors, modified the designation of a bankrupt in the award of sequestration.

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2d DIVISION.

M.K.

MUNGALL having been sequestrated under the bankrupt statute as a 'distiller at Mile-end, and spirit-dealer in Glasgow,' presented a petition, praying the Court to ordain that part of the designation representing him as 'spirit-dealer in Glasgow' to be deleted from the record, he having been erroneously so described in his petition for sequestration. The creditors consented to this being done, and the Court, in respect of their consent, granted the prayer of the petition.

TENNENT and LYON, W. S.—Agents.

No. 469.

J. WRIGHT, Advocate.—*Nerves*.JANET WATSON, Respondent.—*A. McNair*.

*Process*—6. Geo. IV. c. 120.—Incompetent to reclaim against an interlocutor of the Lord Ordinary, refusing as incompetent a bill of advocacy of an interlocutory judgment of an Inferior Court, allowing an oath in supplement in an action of filiation.

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2d DIVISION.

Bill-Chamber.

Lord Medwyn.

B.

IN a process of filiation and aliment of a natural child in the Sheriff Court of Lanarkshire, at the instance of Janet Watson against Wright, the Sheriff pronounced an interlocutor finding her entitled to give her oath in supplement. Wright thereupon presented a bill of advocacy, which the Lord Ordinary refused 'de plano as incompetent, the judgment not being final.' Against this interlocutor Wright presented a reclaiming note, to the competency of which it was objected; that by § 45. of the late Judicature Act, all interlocutors by the Lord Ordinary on the Bills, passing or refusing bills of advocacy from interlocutory judgments of an Inferior Judge, allowed by act 50th Geo. III. c. 119, are declared to be final. To this it was answered, that the Legislature could only intend to leave the matter solely to the Lord Ordinary in cases where he had advised the bill on the merits, and so judged of the expediency of interrupting the cause in the inferior Court; but not in cases like the present, where he had decided as to the competency of the bill. The Court refused the note as incompetent.

LORD JUSTICE-CLERK.—The words of the act of Parliament are precise, and apply directly to such a case as this.

LORD ALLOWAY.—I feel the difficulty of the words of the act; but I

cannot believe that the Legislature intended to vest in a single Judge the power of keeping the party out of Court in cases of this description. The consequences may be very serious.

**LORD PRINCEPATRICK.**—Whatever be the consequence, we must obey the act of Parliament.

**LORDS GLENKLE and ROBERTSON** concurred.

**CAMPBELL and MACDOWALL**,—Agents.

**C. M'INTOSH**, Pursuer.—*Skene—W. Bell.*

**A. COOPER**, Defender.—*Jeffrey—Moir.*

No. 470.

**Process—Bankrupt.**—An averment that a defender was bankrupt, and had executed a trust-conveyance of his estate in favour of his creditors, held not relevant to prevent his maintaining his defence in an action against him founded on a charge of fraud, without finding caution for expenses.

**M'INTOSH** raised an action against Grants for payment of a bill of exchange, in which he also concluded against Cooper, on the allegation that he had embezzled a sum intrusted to him for payment of this bill, and applied it to his own use. No appearance was made by Grants; and, after some procedure in the Outer House, the action was allowed to fall asleep, but was lately awakened by Cooper. M'Intosh, however, contended that he ought not to be obliged to proceed with the action against Cooper, without his at least finding caution for expenses, on the ground that, since the action was raised, Cooper had, as he alleged, executed a trust-conveyance of his estate for behoof of his creditors, and had been made legally bankrupt under the act 1696, c. 5. Cooper, while he admitted his insolvency, and that he had offered a composition to his creditors, denied that he was legally bankrupt, or that he had executed a trust-deed for behoof of his creditors; and he contended, that although M'Intosh should establish these allegations, yet, as a defender, especially in an action resting on a charge of fraud, and thus seriously implicating his character, he was entitled to insist that the action should be proceeded in, to the effect of his obtaining absolvitor and his expenses. The Lord Ordinary found 'that there does not appear sufficient reason why this process should not be permitted to be carried forward in the name of Arthur Cooper as defender;' and the Court unanimously refused a reclaiming note, with expenses.

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Lord Mackenzie.

sic.

F.

**LORD JUSTICE-CLERK.**—The Court are agreed that the interlocutor is right. Cooper has been called as a joint defender in an action founded on the allegation that he has been participant in fraud; and it would be absurd to hold, because he has granted a trust-

dead and is bankrupt, that he should have no persons to defend himself against it.

D. M'INTOSH, W. S.—J. SHANN, W. S.—Agents.

No. 471. Mrs. STEVENSON and Others.—*Sol. Gen. Hope—M'Neill—Menzies.*

Mrs. MACINTYRE.—*D. of F. Cranstoun—Forsyth—More.*

*Testament—Fiar and Liferenter—Legacy.*—A testator having bequeathed his effects to his sisters and their heirs, in the event that after due advertisements for them they should claim within five years from his death, failing which, to certain other persons; and having thereafter restricted the eventual right of these persons to a liferent, with the exception of one of them to whom he gave the fee; and no claim having been made by the sisters or their heirs; and one of the liferenters having died during the currency of the five years—Held,—1.—That the right did not vest in these eventual legatees till after the expiration of the five years—that the interest arising during their currency must be added to the capital sum—and that the right of the party dying in the mean while lapsed;—and,—2.—That the *fiar* was entitled to payment of the share of the fund corresponding to the share of each deceased liferenter, on the death of each of them taking place.

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S.

THE late James Stevenson, by a deed of settlement, conveyed his whole effects to trustees for various purposes, and stated, that, 'Lastly, With regard to the residue and remainder of my subject and effects, I desire and appoint my said trustees to lay out the same, or the free proceeds thereof, upon proper security, payable to themselves, and to hold it in that state during the time after limited; and, in the mean time, to make due inquiry, in order to discover if Janet, Jane, and Anne Stevensons, my sisters, or any of them, or of their lawful children, be in life, besides the said Elizabeth Stevenson in Bocaird, my niece, before mentioned, and if they or any of them appear or are discovered within the space of five years from the time of my death, I direct and appoint my said trustees to lay out and secure the whole foresaid free residue of my effects for the use and behoof of my said sisters, or of such of them as shall appear to survive me, and that in liferent, for their liferent uses equally, and for their children, and the children of such of them as are dead, equally and proportionally amongst them, in fee; but excluding the said Elizabeth Stevenson, my niece, from any benefit from this provision, in case none of my said sisters, or of their children, shall survive me but her: And in order to the more speedy and certain discovery of my said sisters, or any of them, or their families, I direct and appoint my said trustees to cause advertisements or notices to my said sisters and their children, calling



‘upon them, as usual in such cases, to appear and claim the benefit of the before-mentioned provision, to be inserted once every three months, during the first five years after my death, in one London, one Edinburgh, one Dublin, and one New York newspaper; and in case none of my said sisters, or of their children, shall appear, present themselves to the said trustees, or to any of them, instruct their propinquity, and authenticate their claims within the said period of five years from and after the time of my death, besides the said Elizabeth Stevenson in Boscird, who, in that event, is excluded from the benefit of the foresaid provision; then I will and appoint that my said trustees shall hold them as not existing, that the said destination and provision in their favour shall fall and be of no avail, and be held as if never made or granted. And that immediately after the expiry of the said space of five years from the time of my death, the foresaid residue of my effects shall be divided amongst and paid to my other relations after named.’ He then named Mrs. Stevenson and others, and also the other competing party, (his niece, Elizabeth Stevenson or Macintyre,) and declared that the division should be made ‘equally and proportionally amongst them and their heirs respectively. But, in regard that I intend that the shares of the said Elizabeth Stevenson, my niece, and of the said Frances Thomson, shall be held by them in life, and that the fee thereof shall go to their children respectively, I appoint my said trustees to lay out and secure their shares accordingly, and in such a manner as that the fee or capital of the share falling to the said Mrs. Frances Thomson shall, after her death, go to her children by the said Doctor James Stevenson only. And I authorize my said trustees, at any time they shall find it proper or advisable, after my death, to dispose of my stock in the funds, and to invest the proceeds upon heritable, or other good security, in Scotland, for their convenience in executing this trust.’ He also gave power to the trustees to assume others at their pleasure; and he subsequently executed a codicil, by which he declared, ‘That I have resolved to revoke the same (his will,) in so far as regards the fee of the sums disposed to my residuary legatees, in the event that any of my sisters therein named, or their heirs, shall not appear as therein specified. And it is now my will and pleasure, that the residue of my subject, which I appointed by the said deed to be paid over to the said residuary legatees, shall remain under the power and management of my trustees named in the said deed, and the interest thereof paid by the said trustees, by way of annuity, to the said residuary legatees during their natural life; and at

‘ their death I appoint the principal sum to be paid over by my  
‘ said trustees to the said Elizabeth Stevenson, if in life, and,  
‘ failing thereof, to her heirs, as their absolute property. And  
‘ with this alteration, I declare that the said deed shall have full  
‘ effect, and be good and valid to the intents and purposes thereof.’  
The testator having died on 10th May 1818, advertisements were  
made for his sisters and their heirs for five years, which expired  
on 10th May 1823; but no appearance having been made by  
them, and one of the parties, Duncan Campbell, named in the  
deed, having died during the currency of that period, and another,  
the Reverend George Stevenson, Dean of Kilfinora, having died  
in April 1825, the trustees brought a multipiepinding, in order  
to have the rights of parties ascertained. The principal ques-  
tions which arose were,—1. Whether the interest of the capital  
sum which had accrued during the course of the five years was to  
be divided among those who had right as liferenters, or whether it  
was to be added to the capital sum, and so belong to the fiar, and  
the interest of that accumulated fund paid to the liferenters;—  
2. Whether the right of the parties was to be held as vesting on  
the death of the testator, or not till the lapse of the five years;—  
3. Whether the capital was to be considered as a *unum quid*, from  
which the last surviving of the liferenters should have right to  
draw the full interest; or whether it was to be considered as a  
divisible fund, and the portion corresponding to the interest of  
each of the liferenters to be paid to the fiar on the death of each  
of them respectively;—and, 4. Whether Mrs. Macintyre was  
entitled to immediate payment of the share of the capital sum  
corresponding to the interest payable to her as a liferenter, named  
under the original deed. On the part of Mrs. Stevenson and  
others it was contended, in relation to the two first questions, That  
the only alteration which had been made on their rights by the  
codicil was, that they were to be liferenters instead of being fiars;  
that they were declared conditional legatees in the event of the  
testator’s sisters not appearing at the end of five years, so that  
the right immediately vested, subject only to be vacated in the  
event of the sisters of the testator appearing; and that as that con-  
dition was now purified, the interest which arose during the  
existence of it thereby became their property. With regard  
to the other two questions, they maintained, That as it was de-  
clared that the interest was to be paid ‘ to the said residuary le-  
‘ gatees during their natural life,’ and the principal sum was only  
to be paid to the fiar, Mrs. Macintyre, ‘ at their death,’ this ne-  
cessarily meant that it was to be enjoyed by each of them during  
the whole period of their lives, and consequently that Mrs. Mac-

intyre could not take up any part of the capital sum till the death of the last of the annuitants or liferenters. On the other hand, Mrs. Macintyre contended, That the interest arising during the five years must be accumulated into a principal sum ;— that the rights of the parties did not vest till the expiry of the five years ; and that she was entitled, on the death of each of the liferenters, to payment of such a part of the capital as corresponded to their interest, and of her own immediately. The Court, on the report of the Lord Ordinary, ‘ found that the residue of the testator’s estate falls to be ascertained at the 10th May 1823, being the expiry of the five years mentioned in the deed of settlement from the death of the testator, which took place on the 10th May 1818, and that the interest falling due between these periods forms a part of the residue or principal sum of the testator’s estate, and falls to be added as a capital sum ; that the residue of the estate, so ascertained as at the 10th May 1823, is the fund to be liferented by the several annuitants mentioned in the deed of settlement, and alive at that period, and the fee of which sum belongs to the claimant Mrs. Macintyre, but that, by the death of Duncan Campbell, one of the annuitants, before the expiry of the five years from the death of the testator, his annuity lapsed, and the part of the capital corresponding to his annuity falls to the said Mrs. Macintyre, and the interest from the 10th May aforesaid : That by the death of the Reverend George Stevenson, Dean of Kilfinora, another of the annuitants, which is admitted to have taken place on the 4th April 1825, the said Mrs. Macintyre has right to uplift and receive the proportion of the capital sum corresponding to the said George Stevenson’s annuity, with interest from the said day of his death : That the said Mrs. Macintyre is entitled, as fiar of the residue, to uplift and receive at present the portion of the fund in medio corresponding to the annuity provided to herself by the deed of settlement, as being both liferenter and fiar, her liferent being in consequence extinguished, and that upon the death of each of the remaining annuitants, the said Elizabeth Stevenson or Macintyre and her representatives will have right to the capital sum set free and disburdened by the death of each annuitant, until the whole of the residue of the fund in medio set apart, in the mean time, for answering the annuitants, shall be paid over to the said Mrs. Elizabeth Stevenson alias Macintyre and her representatives ; and with these findings remitted the cause to the Lord Ordinary.’

No. 472.

S. PRATT, Suspender.—*Dundas.*D. FLEET, Charger.—*Currie.*

*Meditatione Fuga Warrant.*—A bill of suspension and liberation of a meditatione fuga warrant, presented on the ground that the creditor had not in his oath sufficiently specified the particulars of his debt, passed without caution.

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2d Division.

Bill-Chamber.

Lord Medwyn.

B.

FLEET presented a petition to the Justices of Peace for the county of Edinburgh, setting forth ‘that he was a partner of the firm of Pratt and Fleet, bootmakers in Edinburgh, which was lately dissolved: That the agreement was, that Mr. Pratt became bound to pay the whole debts due by the copartnery, on condition of the petitioner having given up to him the half of the stock in trade belonging to him: That the amount of the debts due by the copartnery is £131 sterling: That notwithstanding the above obligation by the said Samuel Pratt to make payment of the whole of the debts due by the copartnery, the petitioner has received a charge of horning for payment of the sum of £77: 2: 8, contained in a bill granted by the company, which the said Samuel Pratt has failed to pay: That the petitioner believes, and is credibly informed, that the said Samuel Pratt is in meditatione fugæ, and is preparing to leave the country without making payment of the foresaid debts due by the company, and for the purpose of defrauding the petitioner, which renders the present application necessary,’ and praying for warrant to apprehend Pratt accordingly, and bring him before the Justices for examination, and thereafter to incarcerate him till he should find caution judicio sisti. Fleet at the same time appeared and made oath, ‘that what is stated in this petition is true, and that he has been informed, and in his conscience believes, that the therein designed Samuel Pratt is in meditatione fugæ, and about to leave this kingdom,’ with a view to defraud him of his lawful claims. A warrant was then granted to apprehend Pratt for examination; he was accordingly apprehended, and declared that he had no intention of leaving the country, but refused to answer several questions relative to the removal of goods from his shop, and the execution of diligences against him. This declaration was regularly authenticated by the signature of the Justice of Peace in whose presence it bore to have been emitted, and an ex facie regular warrant of incarceration was granted by the Justice, bearing to have proceeded on consideration of the petition and oath of Fleet, and the declaration of Pratt. After having lain some time in jail, Pratt presented a bill of suspension and liberation, on the grounds,—

1. That the oath of the charger was not sufficiently explicit, either as to the debt due to him, or his grounds for believing that the suspender was in meditatione fugæ;—and, 2. That the proceedings above narrated were not, in point of fact, in presence of the Justice of Peace—an allegation, however, denied by the charger. The Lord Ordinary, ‘in respect that the proceedings are *ex facie* regular, and that the bill is offered without caution,’ refused the bill; but the Court by a majority altered, and remitted to his Lordship to pass it.

**LORD ROBERTSON.**—A party applying for a meditatione fugæ warrant must specify the particulars of which his debt consists. This has not been done here, and we must therefore pass the bill.

**LORDS PITMILLY and ALLOWAY** concurred.

**LORD GLENLEE.**—In order to obtain a warrant to apprehend for examination merely, it is not necessary to specify the particulars, so that the party here was regularly apprehended, but the suspender then refused to answer many material questions as to the disposal of his goods, and as to his intentions of leaving the country, which, therefore, sufficiently authorized the warrant to imprison.

*Suspender's Authorities.*—2. Bell, 542-3; Wright, Feb. 6. 1782, (8553); Scudamore, June 3. 1787, (8550); Place, July 2. 1814, (T. C.)

**J. TAYLOR, — J. DUNCAN, W. S. — Agents.**

**F. M'LENNAN, Pursuer. — Baird.**

**No. 473.**

**J. IMRAY, Defender. — Small Keir.**

*Process—Reference to Oath.*—6. Geo. IV. c. 120.—Reference to oath held competent before the Lord Ordinary, notwithstanding the finality of his interlocutor by the above statute.

**M'LENNAN** raised an action against **Imray** for implement of an alleged sale of a house belonging to **Imray** and his wife in conjunct fee, by improbativ missives on the part of **Imray** without any consent of his wife, but followed, as was alleged, by payment of part of the price by **M'Lennan**, and repairs made by him under the eye of **Imray** and his wife, then residing in the house. **Imray** denied that there had been any such rei interven-tus, and further contended, that his wife being conjunct fiar with him, an agreement to sell on his part was not binding, and be-sides, he alleged that it had been departed from, as appeared from letters produced in process. The Lord Ordinary,—1. In respect that the agreement for the house libelled was informal and improbativ in law;—2. That payment to account of the

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**B.**

‘ price of the house is denied by the defender, and not proved by his writing, nor offered to be proved by his oath;—and, 2. That the said agreement, such as it is, was departed from,’ assailed Imray, with expenses. M’Lennan then offered to refer the whole cause to the defender’s oath, but the Lord Ordinary refused to admit the reference as incompetent before him, ‘ in respect that by the act of Parliament, (6th Geo. IV. c. 120,) the Lord Ordinary’s interlocutor is declared to be final.’ Against these interlocutors M’Lennan reclaimed, and the Court recalled both interlocutors, and found ‘ that a reference to the oath of the party is competent before the Lord Ordinary, notwithstanding the finality of an interlocutor, but remitted also to his Lordship to hear parties further on the merits, and to do as he shall see cause.’

**LORD ALLOWAY.**—The Lord Ordinary is in a mistake as to his powers. A reference is always competent at any time before, extract. On the merits the alleged rei interventus would be sufficient, and the plea as to the wife’s consent not having been given is not well founded. The husband must have the management and control of the subject.

**LORD GLENLEE.**—I doubt whether there is here a distinct rei interventus to validate an informal missive; for unless something is done in reference to the informal contract, it is not a rei interventus to support it, and I have also some doubts as to the effect of the plea of the wife’s conjunct fee. But I agree that the reference to oath was competent before the Lord Ordinary.

**LORD PITMILLY.**—I concur as to the reference to oath. Every interlocutor of the Lord Ordinary is made final in the Outer House, and in like manner every interlocutor of the Inner House is final in the Court of Session; but still, after an Inner House judgment, a reference to oath may be made, which, on the Lord Ordinary’s interpretation of the word ‘ final,’ could not be done except in the House of Lords.

**LORD ROBERTSON** likewise concurred.

**AINSLIE and MACALLAN, W. S.—J. HUNTER, W. S.—Agents.**

**Sir NEIL MENZIES, Suspendor.**—*Sol. Gen. Hope—Rutherford.*  
**EARL OF BREADALBANE, Charger.**—*Jardine—Cockburn.*

No. 474.

*Property—River.*—Held that a proprietor on the banks of a river is entitled to erect a bulwark on his own ground for the protection of his property against inundation, although it is alleged that it will be productive of damage to an heritor on the opposite bank, by causing the river in floods to overflow his land.

THE river Tay divides the property of Sir Neil Menzies from that of the Earl of Breadalbane. The river runs in an easterly direction, and at the point in dispute the property of Sir Neil Menzies, which is on the north, consists of an extensive plain, while that of the Earl of Breadalbane, on the south, is of a hilly nature, sloping towards the river, except about fifty acres, which is level. The river had formerly intersected this latter part, but had deserted that channel, and taken another course, making a sweep round the property of the Earl, which thus projected at one point into the river. To protect the level part of the property the predecessor of the Earl had begun to form an embankment on his side of the river, which it was his intention to carry across the old channel, and round the projecting point of the land. Sir Neil Menzies then presented a bill of suspension and interdict, in which he stated, that the embankment or bulwark was erecting 'at the distance of about four or five yards from the ordinary channel, which bulwark, if allowed to be finished, must have the necessary effect of turning the great body of water, which formerly went down upon the south side in the old channel, towards the north upon the complainer's property, and thus overflowing the lands upon that side in a much greater degree than formerly, and of raising the body of water so considerably upon the plains of that side, as to be in its consequences extremely destructive to the complainer and his tenants.' The Lord Ordinary, after ordering a condescendence and answers, (in which it was admitted by Sir Neil Menzies that the embankment was entirely upon the property of the Earl, and not in the channel of the river,) remitted to Mr. Jardine, civil engineer, 'to view and inspect that part of the river in question, its different channels, and to report the probable effects of the operations the charger is carrying on, both as to the property of the complainer and that of the charger.' Mr. Jardine reported, that the old channel was covered with a thick sward of grass; that it had been ploughed, and did not appear to be now a portion of the channel of the river; that according to the general principle upon which embankments were usually formed, the one in ques-

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tion was too near the margin of the ordinary channel of the river ; and he suggested a mode by which the river might be confined so as to protect the grounds on both sides. The Lord Ordinary having reported the question on Cases, Sir Neil Menzies contended, That as a river belongs in common property to the opposite heritors, neither of them is entitled to make any new works, whereby the natural course of the river may be altered, either by accelerating the stream, or causing it to regorge or flow in a new direction ;—that particularly he could not do so where the effect was to impede the extraordinary or flood channel of the river, and thereby turn it against the lands of his neighbour ;—that the embankment in question would have that effect ; and that, besides, if it were completed, the old channel would be entirely shut up, and thereby he would be deprived of one of the means of protection which his lands formerly enjoyed. To this the Earl answered, That every proprietor of a landed estate through which a river flows, is entitled to protect his property from inundation by embanking on his side of the river, provided he do not encroach on the alveus of the stream, but operate entirely on his own ground ;—that it was admitted that the embankment was erected entirely on his own property ; and that although the river had formerly flowed in the old channel, it had deserted that course, which was now the property of the Earl, and under cultivation. The Court unanimously repelled the reasons of suspension, and found the letters orderly proceeded.

The Court were of opinion, that as the embankment was made entirely on the property of the Earl of Breadalbane, it was not relevant to allege that thereby damage would be sustained during floods by Sir Neil Menzies ; and in support of this, Lord Balgray referred to the case of Farquharson, June 25. 1741, (12779.)

*Suspender's Authorities.*—2. Ersk. 1. 5 ; 2. Ersk. 9. 13 ; L. Glenlee, March 14. 1794, (12834) ; Hamilton, March 5. 1793, (12824) ; Dick, Nov. 16. 1769, (12813) ; T. of Aberdeen, Nov. 22. 1748, (12787) ; Faltie, Jan. 26. 1744, (12789.)

A. PEARSON, W. S.—H. DAVIDSON, W. S.—Agents.



R. GRAY, Complainer.—*Forsyth—Jeffrey.*

No. 475.

J. M'NAIR, Respondent.—*Jameson—Ivory.*

*Interdict—Jurisdiction.*—The Inferior Court having granted an interim interdict, and the Lord Ordinary on the Bills having refused to recall it, but passed a bill of advocation, a petition and complaint for breach of interdict held competent.

CERTAIN disputes having taken place between Gray and M'Nair, who were neighbouring coal proprietors,—the former alleging that M'Nair, whose coal-works were higher in point of horizontal level than those of Gray, was in the course of cutting through barriers, whereby the water was discharged into the coal-works of Gray, a submission was entered into by them to two coal-masters. The arbiters issued two interim decrees prohibiting M'Nair from doing any act whereby to cause the water in his pits to flow into those of Gray. The submission having come to an end, without any final decree being pronounced on other points in dispute, Gray founding on the interim decrees, and alleging that M'Nair was acting in violation of them, presented a petition to the Sheriff of Lanarkshire, praying for interdict, which was accordingly granted. Thereafter M'Nair presented a bill of advocation, which the Lord Ordinary passed, but refused to recall the interdict; and Gray, alleging that notwithstanding M'Nair was still carrying on his operations, so as to send down the water into his pits, presented a petition and complaint to the Court, accusing him of a breach of interdict. In defence it was stated by M'Nair, that as the interdict had been granted by the Inferior Court, and as the petition was founded on an allegation of a contempt of that interdict, the complaint was incompetent, seeing that it ought to be presented to the Inferior Court. To this it was answered, that the whole cause had been brought to this Court by the advocation, so that it became a depending process in it, and was taken out of the jurisdiction of the Inferior Court; and as the Lord Ordinary had refused to recall the interdict, and had thereby continued it, the complaint was perfectly competent. The Lord Ordinary having reported the case, the Court sustained the complaint, and remitted to the Lord Ordinary to proceed *quoad ultra*.

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*Complainer's Authorities.*—Lathoker, Feb. 24. 1607, (365); Cranston, July 18. 1618, (365); Charters, March 8. 1634, (368); Marshall, Dec. 12. 1676, (370); Mullikens, June 26. 1706, (393.)

G. DUNLOP, W. S.—GIBSON-CRAIGS and WARDLAW, W. S.—Agents.

No. 476. **MACQUEEN and MACINTOSH, W. S., Pursuers.**—~~Shene—~~  
*Buchanan.*  
**J. COLVIN, Defender.**—*Brown.*

*Agent and Client—Mandate.*—Held that a party, who has authorized an agent in the Inferior Court to raise an action there, is not liable to an agent in the Court of Session for the expenses of an advocacy, unless he has given a mandate authorizing the advocacy, or has taken benefit from it, or been personally aware of a remit to the Inferior Court, although his own agent follow forth proceedings under the remit.

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**MACQUEEN and MACINTOSH, W. S.,** brought an action against **Colvin**, stating that they had been employed by his agent, **Mr. Chisholm**, writer in Inverness, to attend to an advocacy on his behalf, from the Dean of Guild Court there, which was subsequently remitted to proceed in the cause, and concluding for the expenses thereby incurred. **Colvin** admitted that he had employed **Chisholm** to act as his agent in the Dean of Guild Court, but denied that he had given any authority to present an advocacy, or that he had employed the pursuers. The Lord Ordinary having ordered condescendence and answers, the pursuers, inter alia, stated, that after the cause had been remitted, 'the defender availed himself of this remit, and did, in June 1821, apply, through the agency of **Duncan Chisholm**, to the Dean of Guild of Inverness to proceed in the said action, in terms of the instructions and remit of the Supreme Court, which remit was produced to the Dean of Guild, and various proceedings took place at the defender's instance before the Dean of Guild subsequent to this remit.' In answer to this, the defender stated, that he 'admitted that the proceedings here mentioned took place in the Dean of Guild Court; but the defender never heard of the remit in the process of advocacy any more than of the process itself.' The Lord Ordinary decreed in terms of the libel, 'in respect of the facts condescended on by the pursuers, and not denied by the defender **John Colvin**; and particularly that the remit from this Court in the process of advocacy was produced by the said defender (**Colvin**) in the Dean of Guild Court; and that he, by means of that remit, insisted thereafter in the process raised at his instance before the Dean of Guild.' **Colvin** then reclaimed, and contended, that as he had denied he had ever employed the pursuers, and averred that he was entirely ignorant of the advocacy and remit, it was incumbent on them to prove that he had employed them, or that he knew of that remit, and availed himself of it. To this it was answered, that as it was admitted that the defender had employed **Chisholm** to act as his agent in the process, it was not ne-

cessary that the pursuers should have a mandate from the defender in relation to the advocacy, the instructions given by his agent being sufficient ;—that, besides, as the process, after the remit, had been conducted by his authorized agent, and as he must be held as identified with that agent, he had availed himself of the remit, and therefore had rendered himself liable ; and they were not bound to show that he personally was aware of the remit. The Court recalled the interlocutor, and remitted to the Lord Ordinary to allow the pursuers a proof of their allegations.

**LORD PRESIDENT.**—When a case is brought by advocacy from an Inferior Court, the authority of the party for so doing must be obtained just as much as when an appeal is entered from this Court to the House of Lords. The original mandate is a sufficient authority, till recalled, for all that is done in the Inferior Court ; but, when the case is to be advocated, the continuity of that mandate is broken, and it is necessary to have a new mandate. But here there was no such thing ; and it is therefore necessary for the pursuers to show that the defender personally availed himself, or was aware of the remit.

**LORD CRAIGIE.**—The defender does not deny, that after the remit the action was carried on by his authorized agent in the Inferior Court, and we must hold the acts of that agent to be the acts of the defender ; and consequently that he availed himself of the remit. If any other doctrine were sanctioned, it would break all confidence between men of business in town and in the country. I therefore think we have sufficient materials for subjecting the defender to the Edinburgh agents.

**LORD BALGUY.**—There is nothing admitted as to the defender having any personal knowledge of the remit, or of availing himself of it personally. I apprehend, therefore, that the pursuers must prove their allegations.

**H. MACQUEEN, W. S.—R. LOCKHART,—Agents.**

No. 477. **A. FLETCHER, Pursuer.—D. of F. Cranstoun—Marshall.**  
**FLETCHER'S TRUSTEES, Defendants.—Srl.-Gen. Hope—**  
*Macfarlane.*

*Implied Obligation—Restitution—Stat. 10. Geo. III. c. 51.*—A party having, by his deed of settlement, conveyed his estates in trust, inter alia, for the purpose of entailing his lands on his eldest son and a series of substitutes, and for payment of debts and legacies; and the eldest son having taken possession on his apperency, and expended large sums on the estate, and the trustees not having executed the entail till a subsequent period—Held,—1.—That the son had no claim against them for the expenses of the improvements, or to make three fourths of them a burden on the estate in terms of the above statute;—but,—2.—That he was entitled to relief of sums paid in implement of an obligation of the truster for building a farm-stead; and of sums advanced in consequence of a bequest or recommendation to retain an overseer in his situation during the rest of his life.

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THE late General Fletcher Campbell of Saltoun executed a trust-disposition and settlement in favour of certain persons as trustees, whom he also nominated as the tutors and curators of his children, by which he conveyed to them his whole estates and effects for various purposes, and in particular,—1. 'That so far as respects the lands and estate of Saltoun, and parts of the lands and barony of Wester Pencaitland, Milton House in Canongate of Edinburgh, specially disposed to them, the said trustees should provide, dispone, and entail the same by a regular deed of entail to be executed by them in favour of the heirs-male of the said General John Fletcher Campbell's body; whom failing, a long series of substitutes.—2. That out of the rest of the estates and effects they should pay his debts and such bequests as he might make.—3. To pay to the heir succeeding to the estate of Saltoun a sum of £6000, with the bygone and current rents;—and, lastly, That they should apply the produce of the rest of his estates in purchasing lands to be entailed in the same manner as those of Saltoun. By a subsequent deed he appointed a new set of trustees in place of those formerly named, but did not recall the nomination of tutors; and by a memorandum he stated, that 'in remembrance of the old and good servant, I desire that George Anderson, at present acting overseer at Saltoun, be continued with his family in the grieve's house there, upon the same salary, allowances, and other advantages as he enjoys at present, or increased if the times require it,—one part of his duty being to preserve the place, pleasure-grounds, and buildings, in the ornament and improvement of which a considerable sum of money has been laid out.' General Fletcher Campbell died in December 1816, leaving a son, the pursuer, who was then ten years of age. Prior to his death, the General had let the lands

of Greenhead to a tenant, and on the articles of agreement relative to the building of houses he had written in pencil,—‘The house at Greenhead,—the offices old and ill constructed; better give obligation to the tenants to build new than in repairs upon the present.’

The pursuer entered to possession of the estate of Saltoun, and the trustees were infeft under the trust-disposition. During the pursuer’s minority, he, with consent of his tutors and curators, and also after his majority, expended on the improvement of the lands of Saltoun upwards of £26,000, including interest, of which £5500 had been laid out in building farm-houses on Greenhead, and he paid to Anderson during his life a sum which, also with interest, amounted to £1347. In the mean while the entail had not been executed, but on the requisition of the pursuer this was done in the month of August 1825. The pursuer then brought an action against the trustees, concluding that they should be ordained to pay to him three fourths of the above sum of £26,000, or to constitute it a real burden on the land, and also to repay the advances which he had made to Anderson. In support of these claims he stated,—1. That as the trustees had delayed to execute the entail in terms of the trust-conveyance, and as he was thereby prevented from constituting the sums expended by him on improvements a burden on the estate, in terms of the 10th Geo. III. c. 51, he was entitled to be indemnified out of the trust-funds for the above proportion of these advances.—2. That the lands upon which the improvements were made formed part of the trust-estate, and that the expense being in rem versum of them *qua* trustees, the pursuer, as their negotiorum gestor, was entitled to indemnification.—3. That the truster having become bound to build new farm-houses on Greenhead, this formed one of the debts with which the trust was burdened, and therefore he was entitled to repetition of the money so laid out;—and, 4. That the sums which he had paid to Anderson were advanced in terms of the bequest of the truster, and in like manner formed a burden on the trust, and as Anderson had soon after the General’s death become paralytic, the pursuer could derive no advantage from his services. To this it was answered,—1. That the trustees had executed the entail so soon as they were required to do so; that at common law the pursuer could have no demand for repayment of the money laid out by him on property to which he had right, although that right was to be of a limited nature, and that he could not claim it by virtue of the 10th Geo. III. c. 51.—2. That as the trustees were neither out of the country, nor incapable of managing their own affairs, the pursuer had no title to act as

their negotiorum gestor, and therefore could have no right to claim against them in that capacity.—3. That although the improvements might be beneficial to those immediately succeeding to the estate, yet they might be of no avail to the more remote substitutes under the entail, and that the expenses relative to Greenhead might form a good debt against the trust, so far as beneficially laid out;—but, 4. That no such claim could be made on account of Anderson, to whose services the pursuer had right in consideration of the wages paid to him, and that wages were due, whether a servant was in health or in sickness. The Court, on the report of the Lord Ordinary, found the pursuer entitled to repayment of the sums expended in ameliorations on Greenhead, and of the sums advanced and paid to Anderson, and remitted to the Lord Ordinary to ascertain the amount; but, *quoad ultra*, sustained the defences, and absolved the defenders.

*Pursuer's Authorities*.—1. Bank. 9. 4; 3. Ersk. 1. 11; Jack, Feb. 23. 1665, (1219); Halliday, Feb. 20. 1706, (18419); Campbell, July 20. 1725, (9276.)

*Defenders' Authorities*.—Hyslop, Jan. 18. 1811, (T. C.); 3. Ersk. 1. 11; Bates, Dec. 4. 1725, (13408); Dunbar, June 14. 1623, (13360); Selbie's Heirs, June 5. 1795, (13438); Hodge, Feb. 1664, (2651); Kinlayson, Dec. 12. 1821, (*ante*, Vol. 1. No. 243); Campbell, May 5. 1822, (*ante*, Vol. 1. No. 466.)

J. GIBSON *jun.* W. S.—J. HOME, W. S.—Agents.

No. 478.

G. BAIRD, Advocate.—*Jeffrey—Shaw.*

W. HAMILTON, Respondent.—*More—Napier.*

*Master and Servant—Reparation*.—A master having intrusted his servant with the charge of a cart and horse, and a child having been injured by the cart in consequence of the negligence of the servant—Held that the master is equally as liable in reparation as if it had been done by his own negligence.

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M'K.

HAMILTON, residing in Williamsburgh, a suburb of Paisley, as tutor and administrator at law to his daughter Nancy Hamilton, a child of about three years old, brought an action before the Sheriff of Renfrew to recover damages in reparation of an injury suffered by her in consequence of being thrown down by a horse and cart belonging to Baird, a farmer in the neighbourhood. It appeared from a proof that this cart and horse had been intrusted by Baird to his servant, a lad apparently about 17 or 18 years of age, and that, while passing through Williamsburgh, in coming out of Paisley, loaded with dung, the cart and horse being about a yard and a half from the foot path, on the wrong side of the road; and the servant being about 100 yards behind them, had knocked down the child, who was then playing on the road, in front of her father's door, and severely bruised her

right hand, whereby she entirely lost the use of one of her fingers. No evidence, however, was produced to show that the servant was either an unfit person to act as a driver, or that he had been formerly guilty of negligence. The Sheriff having found Baird liable in £40 of damages, he brought an advocacy, on the grounds,—1. That to make a master liable for injuries done ex culpa of his servant, it was necessary that there should be some negligence or blame on the part of the master himself; that the general rule was, *culpa tenet suos auctores*, and therefore it was requisite to trace culpa to the master, as, for example, that he had committed to a single servant more horses than he could possibly manage, or continued to employ a servant who had previously shown himself careless; but that where no such negligence occurred, and where no culpa could be imputed to him, the master was no more answerable for injury occasioned by any accidental carelessness on the part of the servant, than he would be for damage occasioned by the sudden fury of a domestic animal which had never previously shown any symptoms to create ground for precaution or suspicion; and that in the case of *Fraser v. Dunlop*, on which the pursuer chiefly founded, the master had been guilty of such negligence in giving one servant the charge of two carts with two horses in each; and as to the cases referred to of coach proprietors being found liable for injury suffered by the passengers through negligent driving, that their liability arose directly *ex contractu*.—2. That the carelessness of the pursuer, in allowing his child to play unwatched on a public and frequented road, was a bar to his demand for damages;—and, 3. That the servant ought to have been made a party. The Lord Ordinary having reported the cause on informations, the Court unanimously repelled the reasons of advocacy, and found expenses due.

**LORD GLENLEE.**—There is something founded in our nature which views the mere connexion of dominium, as inferring a liability for injury done by any thing which is our property. I do not justify the feeling; but it is a natural one, and we see it exemplified in the doctrine of *deodand*; and there is a great deal in the simple ground that the damage was done by the defender's horse and cart, when no one was looking after them; nor is it a sufficient defence for the party to say, 'I hired a servant to attend to it.' The master is liable for the carelessness of his servant. It is essential, however, that the damage should arise from the way and manner of doing the master's work. For, suppose a servant takes offence at another man, and horsewhips him, though at the time he is conducting his master's cart, yet the damage is not inflicted in the doing of it—he is acting for himself, and the master is not liable.

But in this case the injury was done by the defender's horse and cart, and by the negligence of his servant, and therefore the inter-locutor of the Sheriff is right.

**LORD ROBERTSON.**—The question to be decided is correctly stated in the pursuer's information—'Is a master liable for damages in reparation of an injury inflicted by his servant through carelessness and negligence in the performance of some work committed to him by the master?'—and I am of opinion that he is. It is necessary, for the safety of the lieges, that masters should be bound to employ servants of such character, as will conduct their carts with safety to the public.

**LORD PITMILLY.**—This case, though important, is not difficult. There are two things which go to decide it:—1. The servant was doing an act which he was specifically hired and employed by his master to perform, wherein it is distinguished from the case of *Linwood*, where no orders were given to cut down the tree which occasioned the injury.—2. The accident happened from the omission of ordinary caution in performing that act; and in this also it differs from the case of *Linwood*, where it was nearly a *casus fortuitus*. I cannot therefore doubt the master's liability here, and the authorities are very strong. The case of *Fraser v. Dunlop* is very clear as to principle, for the decision there was on the relevancy; and in *Lord Keith v. Keir*, in which I was counsel for his Lordship, although it appears a hard case, the decision, I am satisfied, is right in principle, for as he was employing servants to clear the moss, though not in the way which they adopted, the accident happened in doing a deed which he had employed them to perform. There is nothing in the specialities pleaded of the servant not being made a party, &c.

**LORD ALLOWAY.**—I entirely concur. If there is any one point fixed by the general law of Europe, it is the liability of a master in a case like this. Questions as to passengers of stage-coaches depend on the same principle; and also the common law responsibility of owners of ships for injuries done to other vessels by the fault of their crews. Punishment may attach to the servant alone, but a claim for damage or amputation always lies against the master.

**LORD JUSTICE-CLERK.**—The special objections taken here are not sufficient to bar the action, and on the merits I agree with the opinions already delivered. It may sometimes happen that although the driver be carefully guiding the cart, and at his horse's head, a child rushes suddenly out, in such a way as to make it impossible to prevent injury; but here the driver was not where he is ordered by law to be—he was not at his horse's head, but had left the horse and cart to straggle along the road. This, therefore, was not a case of mere accident, as the majority held it to be in *Linwood*, which I accordingly throw out of view, but fits of gross negligence and culpability by the servant in doing an act which he



was employed by his master to perform; and I conceive that a master is bound to employ persons of competent skill and carefulness. He is under a covenant to the public to do this, and if he fail, he is liable in the consequences. In the case of Brown, although the liability of the owner of the stage-coach might rest on a different principle, it being a passenger who lost his life, yet the award of damages against the owner of the post-chaise, whose postillion drove a race with the coach, must have proceeded on the principle of his liability for his servant, as he had no contract with the passenger. And as to the case of Keith, although I may, in giving my opinion in Linwood, have expressed a doubt of it as it is reported, I am satisfied that it was well decided, as the facts really stood. It appears from the session-papers that his Lordship authorized the servants to make use of a fire—a most important circumstance not noticed in the report. In the present case we must adhere to the Sheriff's judgment; and I hope that our decision will lead to much greater caution on the part of owners of carts and carriages in the choice of those to whom they intrust them.

*Advocator's Authorities.*—1. Stair, 9. 5; 1. Bank. 2. 30; 3. Ersk. 1. 13-15; Bacon's Abridgment, p. 587; Pothier des Oblig. p. 80; Linwood, May 14. 1817, (F. C.); Duke of Roxburghe, March 1. 1822, (ante, Vol. I. No. 415); Butterworth v. Forrester, (11. East, 61.)

*Respondent's Authorities.*—Pothier des Oblig. i. 1. 2. and ii. 2. 8; 1. Bank. 2. 30; Black, Feb. 9. 1804, (F. C.); Brown, Feb. 26. 1812, (F. C.); Keith, June 10. 1812, (F. C.); Fraser, Jan. 22. 1822, (ante, Vol. I. No. 258); Sammel v. Wright, (5. Esp. 268); Lord Raymond's Rep. p. 789; Stables v. Ely, (Carrington and Bayne, 614.)

A. NABBE,—J. NAIRN,—Agents.

W. FINLAY, Pursuer.—*D. of F. Cranstoun—Skene.*

A. WALKER, Defender.—*Sol.-Gen. Hope—Menzies.*

No. 479.

*Sheriff Court Small Debt Act—6. Geo. IV. c. 24.*—Held that in process under this act, when a pursuer intends to resort to the declaration or oath of the defender, he must intimate this as a 'mean of proof,' otherwise the decree is liable to reduction.

By the 6. Geo. IV. c. 24, it is made 'lawful for any Sheriff 'in Scotland, within his county, to hear, try, and determine all 'civil causes and complaints that may be competently brought 'before him, where the debt or demand shall not exceed the value 'of £8 sterling, exclusive of expenses and fees of extract, in a 'summary way,' therein specially set forth; 'provided always, 'that a copy of the said petition or complaint, with the citation 'annexed, and also a copy of the account, document of debt, or 'state of the demand, with the names and designations of the 'witnesses and havers, and a statement of other means of proof, 'shall be delivered at the same time with the copy of the said

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‘petition by the sheriff-officer to the defender personally, or at his dwelling-place.’ It is further provided by the statute, ‘That when the parties shall appear, the Sheriff shall hear them *vis à voce*, and examine witnesses or have upon oath; and also the parties by declaration or upon oath;’ and it is declared, ‘That no decree given by any Sheriff, according to the forms and regulations of this act, shall be subject to advocacy, suspension, or appeal, or any other form of review or stay of execution other than herein before provided, excepting only an action of reduction before the Court of Session, on the ground of corruption, or malice, or oppression on the part of the Sheriff.’ Under this statute Walker brought an action against Finlay before the Sheriff of Kincardine for payment of an alleged debt of £6; but, in serving him with a copy of the complaint and relative account, he did not state any means of proof, because (as the defences in the present action bore) ‘he did not mean to lead any evidence, and trusted to establish his case by the admission of the said William Finlay in his declaration or on his oath.’ The parties appeared before the Sheriff, and he having heard them, gave decree against Finlay in the form prescribed by the statute, without any regular declaration or reference to oath. Of this decree Finlay brought a reduction, without alleging corruption, malice, or oppression; and he contended, (in opposition to an objection to the competency founded on the provisions of section 9. of the statute,) and as a ground of reduction, that the regulations of the act of Parliament had not been complied with, in so far as Walker had not served him with a statement of the means of proof by which he was to support his claim, and consequently that a reduction was competent. To this it was answered, that the phrase ‘means of proof’ in the statute could only have reference to the mode of establishing the debt, in the event of its being denied by the defender, but could not apply to his own admission of the justness of the claim, whether on oath or otherwise. The Lord Ordinary having made *avizandum* ‘with the question of competency,’ the Court, after consulting the Judges of the First Division and the Outer House, ‘in respect the act of Parliament has not been duly followed out in this case in the proceedings before the Sheriff,’ sustained the reasons of reduction, and reduced and decerned accordingly.

Lord GLENELG and PITMILL were of opinion, that as no proof was offered or required either by declaration or oath on reference, but the Sheriff having decided on hearing parties, who might have differed on a point of law merely, there was no necessity to intimate any.

means of proof, when none was to be had recourse to; and that the reduction therefore was incompetent.

LORD MIDWINTER was of opinion, 'that the object of the Legislature was to inform the defender what evidence, by witnesses or writings, were to be adduced, that he might, at the same diet, be prepared with counter-evidence; and that neither the object nor the words of the act required, that when the pursuer is to rest his case either on the declaration of the defender, as was done here, or his oath, it is necessary to specify this at the time of citation;' and 'that it seems to be of great consequence that such an institution as the Small Debt Court, from which legal practitioners are anxiously excluded, should not be embarrassed by the observance of technical forms, if not essential, or at least conducive, to the ends of justice.'

All the other consulted Judges (with whom LORDS JUSTICE-CLERK and ALLOWAY concurred) returned the following opinion:—'If a party, after resorting to and failing in other means of proof, intends then to resort to the oath of his adversary, he is bound to give notice of this. The oath of party is certainly 'a mean of proof;' and as the act requires, that besides the names and designation of the witnesses and havers, a statement of other means of proof shall be delivered at the same time with the copy of the petition, &c.,—the Judges are of opinion, that the oath of party must be held to fall under this enactment; and it is important that it should be so, to prevent the party being taken by surprise in solemn and conclusive a mean of proof as reference to 'oath.'

J. JAMESON,—G. R. KINLOCH,—Agents.

MRS. BLAKE, PURSUER.—*D. of F. Cranston—Jeffrey—Matheson.* No. 480.  
HENRY M. BLAKE, Defender.—*Sol.-Gen. Hope—Greenshields.*

*Husband and Wife—Divorce—Citation.*—Held that a decree of divorce was ineffectual, which had been obtained by a husband who had deserted his wife, who, without her knowledge, had come to this country, and after being 40 days here, had raised an action of divorce against her, without giving her any other notice than the usual edictal citation, and both parties being natives of Ireland, never having been in Scotland, except for a single day when they were married, and she being resident in England.

EARLY on the morning of Monday the 5th of September 1814, July 6. 1826.  
the pursuer, then Miss Gossen, and the defender Mr. Blake, both  
natives of Ireland, came from that country to Port-Patrick, were  
married there on the same day by the Rev. Dr. Mackenzie, 1st Division.  
minister of the parish, and returned to Ireland on the following Lord Medwyn.  
day. They had a son, and lived together as married persons till S.

the end of October 1816, or, as she alleged, till April 1817, when the defender, alleging that she had committed adultery, deserted her, and she thereupon went to reside in London, while he remained in Ireland. About the end of April 1823 he came to Scotland, took a furnished house at Portobello for five months, and a shooting residence in Atholl for three years, and during the autumn of the above year he went thither with two friends and servants. After having been 40 days in Scotland, he instituted a process of divorce before the Commissaries, to which he called his wife as defender, who was still in London, by edictal citation. No tutor ad litem was appointed to her,—a proof was taken ex parte, and a decree of divorce was obtained on the 24th of October 1823. He immediately returned to Ireland, where he continued to reside, having abandoned the shooting-quarters which he had taken. His wife was made aware of the decree by an advertisement of it which she observed in the Dublin Evening Post on the 11th of December 1823. She then forthwith caused inquiries to be made by an agent in Edinburgh as to the fact, and it appeared that the defender must have been aware of these inquiries, as a request was sent to her agent in January 1824, by a man of business in Edinburgh, for copies of any summons of reduction which might be raised by her, as he had been instructed to defend the case. The defender came to Scotland in the month of May of that year, where he was again married, and soon after returned to Ireland. In the month of July thereafter, the pursuer raised an action of reduction of the decree of divorce, on the ground,—1. That ‘it was obtained against the pursuer in absence, the summons having been executed against her edictally as furth of the kingdom, and no intimation having been made to her of the dependence of the action by the said Henry Martin Blake, though he knew where she resided, and was in correspondence with her at the time;’—and, 2. That the Commissaries had no jurisdiction over her, as she was not domiciled within Scotland, and her husband had, without her knowledge, come to Scotland solely with the view of pursuing the action. To this it was answered,—1. That Scotland being the *locus contractus*, the Commissaries had thereby a jurisdiction in relation to all questions arising out of the marriage contract;—2. That as the domicile of the defender was, at the date of the action, in Scotland, it must be held to be the domicile of his wife, and that, therefore, the Commissaries had power to entertain the action;—and, 3. That as she had been edictally cited, she had received that intimation which alone is required by law, and it was not necessary to intimate to her personally. The Court, on

the report of the Lord Ordinary, found; 'That the defender in the reduction, Henry Martin Blake, between the months of October 1816 and March or April 1817, separated himself from the pursuer, and that in the year 1823 he came to Scotland, the pursuer at that time residing in England; that, in these circumstances, he commenced and carried through the action of divorce, without giving her any information either of his residence in Scotland, or of the action which he was pursuing before the Commissaries, otherwise than by going through the form of edictal citation; that in these special circumstances, and without determining whether the defender had himself acquired a legal domicile in Scotland, to give jurisdiction over him to the Courts of this country, there is, at any rate, no reason for holding that the domicile of the wife was in Scotland, so as to subject her to the jurisdiction of the Commissaries; and therefore sustained the reasons of reduction, and reduced, decerned, and declared in terms of the libel, and found the defender liable in expenses.

**LORD PRESIDENT.** — It does not appear to the Court necessary to decide the general question as to jurisdiction, which has been chiefly argued by the parties, because we are all of opinion that the special circumstances attending this case are sufficient to decide it. It is no doubt true, that the husband's domicile is that of the wife; but, in a proceeding of this nature, and where both have formerly been domiciled abroad, if he come to Scotland, he is bound to let his wife know that he has done so, in order that she may be aware of his change of residence. In this case, however, no such notice was given, although the parties had been living in a state of separation for nearly three years, and the pursuer could not be aware of all the defender's movements. It has been argued, that she was legally cited at pier and shore, and it is perfectly true, that without such a citation she was not bound to appear in Court. But, in a matter of this description, such a citation is not sufficient. It was further requisite to give her notice personally of the process, by intimation of it to her either by a notary public, or in such a way that she could not have pleaded ignorance. This case is altogether different from that where a party by his own acts constitutes a domicile in this country. If he be within the territory, he must be cited according to the forms prescribed by law; and if he has gone out of it, he ought to instruct some person to attend to his interest, in case of being cited in his absence. But this lady did not constitute Scotland her domicile by any act of her own. This was done by her husband; and perhaps, if he had made her aware that he was coming to this country to raise the process of divorce, an edictal citation might have been suffi-

cient; but it is absolutely necessary that she should have been put upon her guard that such a process was in contemplation.

**LORD BALGONAY.**—I am entirely of the same opinion, and indeed if we were to sustain this decree, the most flagrant evils would be produced, and disgrace would be attached to the law of Scotland. Here is a person who never was in Scotland except for a few hours to be married, separates himself from his wife for six or seven years, and then comes here on a shooting expedition, and after the lapse of 40 days gets a decree of divorce. Even where married persons are residing together, it is not usual for the husband to take his wife along with him on a shooting expedition, and yet, according to the doctrine of the defender, an Englishman or Irishman who has been married here may set off for Scotland when he is tired of his wife, on pretence of a shooting expedition, and carry a decree of divorce home with him in his pocket, without his wife knowing any thing of the matter. I was counsel in the case of Pirie against Lunnan, where Lord Braxfield refused a bill of advocation, although defended, against a judgment of the Commissaries refusing to sustain the jurisdiction, and in a petition to the Court, I suggested that intimation should be made personally to the husband. This was ordered, and it was given by a notary public, but nevertheless, and although there was still no appearance by him, many of the Judges were for refusing the petition, but at last it was granted quantum valeat. The case is quite correctly reported. I have therefore considerable doubts even on the question of jurisdiction, but the circumstances of this case do not render a decision on that point necessary.

**LORD CRAIGIE.**—This is an important case, and I concur in the opinions which have been delivered, and in addition it may be observed, that no tutor ad litem was appointed, and that the proof was taken entirely ex parte to show that adultery had been committed in Ireland. I think we ought to restore this lady to the same situation in which she would have been if due notice had been given to her of the action.

The **LORD PRESIDENT** stated, that Lord Gillies, who was absent, was of the same opinion with the other Judges.

*Purser's Authorities.*—1. Huber, 3. 8; 9. Voet, 2. 5; Edmonstone, June 1. 1818, (F. C.); Forbes, June 1. 1816, (F. C.); Lolley, 1812, (Russell and Ryan's Cases, 237); 1. Dow, 117; 1. Ersk. 2. 20; Muller Prompt. Juris. 584; Brunsford, Feb. 9. 1789, (4784); Pirie, March 3. 1796, (4794); French, June 13. 1800, (No. 1. Ap. For. Comp.); Wyche, June 27. 1801; (No. 2. ib.); Marcomb, June 27. 1801, (No. 3. ib.); Ferg. Div. Cases, 46. 60. 61; 1. Dow, 137; Ferg. Div. Cases, 251; 1. Ersk. 6. 54.

*Defender's Authorities.*—1. Ersk. 2. 20; Dodds, June 11. 1745, (4793); Pirie v. Lunnan, March 3. 1796, (4794); Lindsay, Jan. 26. 1807, (No. 6. Ap. For. Comp.); Kibble White, June 1. 1816, (not rep.); Carps. Jurisp. Eccle. 3. 5. 62.

T. MACKENZIE, W. S.—T. JOHNSTONE, — Agents.

H. HARMAN, Pursuer.—*Sol.-Gen. Hope—Wood.*

No. 481.

MACALISTER'S TRUSTEES, Defenders.—*Jeffrey—A. M'Neil.*

*Husband and Wife.*—A husband living in a state of voluntary separation from his wife, against whom he had raised an action of divorce, held liable to an English solicitor employed by her in relation to her defence, and also to other matters requiring his assistance, although her husband gave her an ample allowance for her maintenance.

GENERAL MACALISTER, a native of and proprietor of an estate in Scotland, was married there in 1814 to Miss Allan. While residing in London, a voluntary separation took place in consequence of an allegation on his part that she had been guilty of adultery, and he agreed to allow her £30 per month 'for her maintenance, pending a suit about to be instituted for a divorce,' besides paying for her lodgings. He then raised a suit against her in Doctors Commons for a separation a mensa et thoro, and she brought a counter-action for restitution of conjugal rights. The General abandoned his suit, and went to Scotland, where he instituted a process of divorce, and in the action at her instance in Doctors Commons he was pronounced in contempt in respect of non-appearance. After a long litigation before the Commissary Court and Court of Session, (during which several interim decrees were pronounced in favour of her agent for expenses, to enable her to defend herself,) decree of divorce was pronounced. Mr. Harman, a solicitor in London, had been employed by her to attend to her interests in relation both to the voluntary separation, to payment of her allowance, to the actions in Doctors Commons, and to certain proceedings which took place in England, connected with the action depending before the Commissaries; and in this way she had contracted a debt to him to the extent of £284: 18: 9 for the business arising out of the Commissary Court process, and £188. 5s. for the other business. Both General Macalister and his wife being dead, and he having conveyed his estates to trustees, Harman brought an action against them for payment of the above sums. In defence it was maintained,—1. That as Mrs. Macalister had an ample separate allowance, of which Harman was fully aware, he must be held to have trusted entirely to her credit;—2. That by the law of England Harman had no right to payment from the husband of the expenses in suits there, and that, supposing he had a claim against him, it could extend only to the expenses as taxed by the proper officers of the Courts in which they had been incurred;—and, 3. That it was not competent to bring a separate process for those

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which had been incurred in the Commissary Court, as he could obtain decree in a process there, if his claim were well founded. To this it was answered,—1. That the allowance to Mrs. Macalister was for her maintenance exclusively, and the circumstance of Harman being aware of this could not bar his claim.—2. That as a husband is bound to pay all the wife's debts contracted for necessities, until a sentence of divorce is obtained; and as the account which she had contracted with him was of that nature, it was the husband's own proper debt, and therefore he was entitled, both by the law of England and of Scotland, to full payment, and not merely as taxed between party and party;—and, 3. That this being a claim of the above nature, the action was perfectly competent. The Lord Ordinary, before answer, appointed a Case to be prepared for the opinion of English counsel, 'in respect that, at the time the account was claimed by the pursuer, both parties resided in England, and the agreement with respect to a separate aliment was an English contract, and the greater part of the accounts in question related to the expense of judicial proceedings instituted in England, and the defenders have stated that the husband or his trustees were not liable for this account by the law of England, while the contrary has just been as strongly asserted by the pursuer.' A Case was accordingly prepared and laid before Mr. Adam and Dr. Lushington, who stated, 'That by the law of England, General Macalister, during his life, and his personal representatives on his decease, were liable to the payment of so much of the expenses incurred in the proceedings in the Ecclesiastical Court in England, as would be allowed by that Court on taxation. The particular items we cannot specify. The Registrars of the Ecclesiastical Court alone are competent so to do. As for all other charges in or about the suit in the Ecclesiastical Court, which the Registrar would not allow on taxation, we are of opinion that General Macalister was not liable therefor, and that his personal representatives are not now liable. We are of the same opinion as to all charges for general business. With respect to the charges for business done in England relative to the suit before the Commissaries in Edinburgh, we are of opinion that so much thereof as the Commissary Court would allow as reasonable expenses on the part of the pursuer would be recoverable from the personal representatives of General Macalister, and no more; for any other charges relating thereto, we think no action would lie. No suit could be revived in the Ecclesiastical Courts of England; such suits are personal, and abate by the death of the party.'

In the mean while, an interim decree had been pronounced in





favour of Harman for £150 to account of the expenses incurred relative to the Commissary Court process; and although a representation was lodged against this, yet the defenders paid £100, and the pursuer had also moved for and obtained decree in the Commissary process for £226: 2: 1, being the taxed amount of his account. Thereafter, on advising the opinion, the Lord Ordinary refused the representation against the interim decree, and found the defenders liable to the pursuer in the sums pursued for, with interest as libelled, deducting always the sum of £100 paid in part upon the 4th September 1822, and the farther sum of £236: 2: 1, being part of the account of £254: 18: 9 pursued for, admitted by the pursuer to have been decerned for by the Commissaries of Edinburgh upon the 18th of February last; and the Court adhered.

*Pursuer's Authority.*—Grant, Nov. 18. 1762, (4036.)

*Defenders' Authorities.*—Robins, July 6. 1688, (5955); Gordon, Dec. 13. 1776, (No. 4. Ap. Husb. and Wife.)

J. RUSSEL, W. S.—J. BRIDGES, W. S.—Agents.

Mrs. MOIR and Others, Petitioners.—*Moncreiff—Brown—Urquhart.*

No. 482.

*Nobile Officium—Trust.*—The Court declined to nominate a trustee on the decease of one, appointed by a private trust-deed, and who had been infeft in the trust-property, but whose heirs refused to act. They, however, appointed a factor, with power to take the necessary steps for investing himself with the trust-property.

Mrs. MOIR, with consent of her husband, executed a trust-disposition of certain property belonging to her, in favour of Mr. Moir of Scotstown, his heirs and assignees, for the purpose of paying certain debts, annuities, and sums of money, to different persons mentioned in the deed, and accounting to herself for the balance of the funds. Mr. Moir was accordingly infeft in the trust-property; but, on his death, Mrs. Bruce, his only daughter and heir, declined to accept the office of trustee, although she was willing to make up titles, and convey the property to any person who might be duly named to execute the office. In consequence of two of the parties interested under the trust-deed being in India, so that their concurrence in the appointment of a trustee could not be obtained without delay, Mrs. Moir, and all the parties in this country having an interest under the trust-deed, applied to the Court to nominate a trustee, and to authorize Mrs. Bruce to make up titles, and convey to him the trust-property.

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The Court, however, refused to exercise this power, but allowed the petitioners to amend the prayer of their petition, so as to crave the appointment of a 'factor upon the estate, with power to take all steps necessary for investing himself therein, in order to execute the purposes of the trust; and this having been done, they granted the prayer so amended.

The majority of their Lordships were of opinion, that although, in cases where there was an absolute necessity for their interference, the Court would appoint a trustee, there did not exist such necessity here.

*Petitioners' Authorities*.—Campbell, June 26. 1752, (7441); *Witherspoon*, Dec. 15. 1775, (7450); *Drummond*, June 30. 1758, (16206); *Harper v. Gordon*, Dec. 4. 1821, (ante, Vol. I. No. 221.)

INGLIS and WEIR, W. S.—Agents.

No. 483. Sir J. CARNEGIE, Suspender.—*D. of F. Cranstown—Skene*.  
J. BRAND and Others, Chargers.—*Jameson—Gillies*.

*Salmon-Fishing*.—Bill of suspension of stake-nets at the mouth of the Southesk passed, but interdict refused *hoc statu*, the chargers being bound to keep an account of the fish caught.

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Bill-Chamber.

Lord Medwyn.

M'E.

THIS was a bill of suspension and interdict presented by Sir James Carnegie, proprietor of salmon-fishings in the river Southesk, against Brand and others, to have them interdicted from taking salmon by means of stake-nets which they had erected on certain sands situated at the mouth of the river Southesk, as being illegal, and in contempt of the judgment of the Court in an action at the instance of the suspender's father, decided March 7. 1812. The Lord Ordinary reported the bill, with answers; and the Court, considering that it was disputed, and was subject to some doubt, whether the stake-nets were situated on what was properly the bank of the river or the sea-shore, while they passed the bill, refused the interdict *hoc statu*,—the chargers keeping an accurate account, which they could verify on oath, of all the fish caught by them in the nets in question.

T. MACKENZIE, W. S.—J. THORBURN,—Agents.

J. M'MICHIE and Others, Pursuers.—*Wmgham.*

No. 484.

J. PHILLIPS, Defender.—*Macallan.*

*Agent and Client—Eviction—Settled Account.—Circumstances in which it was held, that a law-agent's account was not liable to be objected to, although it had not been taxed, and was alleged to have been made up on a scale different from that fixed by the rules of the Court where he practised.*

M'MICHIE and others, tenants of a farm rented at £15 per annum, employed Phillips, writer in Crieff, to raise an action before the Sheriff of Perthshire against certain persons who, they alleged, had committed a trespass upon their farm, and by which they had suffered serious damage. Phillips accordingly presented a summary petition, of which the prayer was, to interdict the parties trespassing from doing so in future, 'and to find them liable to the petitioners in the sum of £500 sterling of damages for their most illegal conduct in forcibly possessing part of the petitioners' farm, although repeatedly ordered to remove their stocking therefrom.' A litigation having ensued, an account was incurred to Phillips of £32:1:9, of which M'Michie and others paid £15:3:6. For the balance, being £14:8:8, he raised an action, and obtained a decree in absence. They then accepted a bill to him for £12. 4s., (he having allowed a deduction of the difference,) and when the bill fell due they paid the amount to him, together with the expenses of the decree. Thereafter they brought an action of reduction of the decree and of the bill against Phillips, on the ground, that by the regulations of the Sheriff Court of Perthshire, the agents were obliged to make their charges according to the amount of the sum at issue; that particularly it was declared, in regard to summary actions, that they were to be 'charged at the rate allowed for ordinary actions for sums of the same extent, except when the pecuniary conclusion in the petition is for a random claim of damages, in which case, when either party is found entitled to expenses, the charge will be regulated according to such of the above rates as the Sheriff shall direct;' that as the rent of the farm was only £15 per annum, the charges ought to have been made according to the scale corresponding to that amount, whereas they had been framed on a scale applicable to actions for £50 and upwards. To this it was answered,—1. That as the account had been duly rendered, and as a partial payment had been made, and as decree had been allowed to pass for the balance, and as a bill had been granted for the amount, and a deduction in consideration thereof allowed, and this bill had been retired, it was not now competent

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to open up the account ;—and, 2. That the prayer of the petition being for interdict in protection of a farm, of the lease of which there was a number of years to run, the value could not be estimated by the annual rent, but by the worth of the lease itself; and the conclusion for damages was not random, but for indemnification of the loss actually sustained. The Lord Ordinary found ‘ that the account of expenses, for which decree in absence ‘ was taken in the Sheriff Court of Perthshire, was not made out ‘ in terms of the regulations of Court, and that the deduction ‘ from the amount of the account does not give the character of ‘ a transacted claim to the charge ultimately made;’ and therefore reduced in terms of the libel, and appointed ‘ the defender ‘ to put into process an account of expenses calculated at the scale ‘ of from £15 to £25, and certified by the Sheriff clerk of Perthshire to be according to the regulations of that Court.’ But the Court altered, and assolizied the defender.

Some of the Judges expressed considerable doubts whether this case was to be regulated by the scale mentioned by the Lord Ordinary; but, independent of this, they were unanimously of opinion that the pursuers were not entitled, after all that had taken place, to open up the account; and, in support of this, Lord Balguy referred to the case of *M'Donald v. M'Kenzie and Mann*, Feb. 6, 1823, (ante, Vol. II. No. 169.)

T. BRUCE JUN. W.S.—D. GRAY,—Agents.

No. 485. BANK OF SCOTLAND, Pursuer.—*Sol. Gen. Hope—Walker.*  
J. MACDONELL, W. S. Defender.—*Jameson—A. Wood.*

*Competition—Assignment and Arrestment.*—Held, that after an arrestment in the hands of a trust-assignee, he is not entitled to make advances to or on account of the trustor.

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H.

ON the 22d of July 1817 Mr. M'Ewan, writer to the signet, executed in favour of the defender, Mr. Macdonell, an *ex facie* absolute assignment of a claim which he had, to the extent of about £800, against Graham of Leichtoun. At the time of receiving this assignment, Mr. Macdonell advanced to M'Ewan £90; but he admitted that he held it quoad ultra in trust for the purpose of recovering the debt due by Graham, and for relief of all advances he should make to or on account of M'Ewan. He accordingly raised an action against Graham; and on the 2d of February 1819, having obtained an interim decree for £800, the Bank of Scotland, on the 8th and 9th of that month, executed

arrestments in his hands, and in those of Graham. In the mean while Mr. Macdonell, as agent for M'Ewan, had opposed a process of cessio at the instance of one Clark, in consequence of which the latter was compelled to assign, for behoof of his creditors, an annuity of £50 payable to his wife. Of this assignation, however, she brought a reduction, in which she was at first unsuccessful; but, on a second petition to the Court, she obtained a judgment in her favour. In these processes Mr. Macdonell had expended a considerable sum of money, and although they had been commenced prior to the date of the arrestment, yet they were not terminated till after it had been executed. Thereafter, in the month of August 1820, new arrestments were executed by the Bank, and a process of furthcoming was then instituted against Mr. Macdonell. In defence he maintained, that he was entitled to retain, not only the sums which he had advanced for M'Ewan, and the account of expenses incurred to himself, prior to the arrestments in February 1819, but also those subsequent to their date, both in the action against Graham, and in those with Clark and his wife, seeing that he had acted on the faith of the assignation, and that the proceedings in Clark's process were of a nature calculated to be beneficial to M'Ewan and his creditors. To this it was answered, that although he might be entitled to retain the sums advanced prior to the date of the arrestment in February 1819, and the account of expenses incurred in making the debt against Graham effectual, yet as the funds in his hands truly belonged to M'Ewan, he was not entitled thereafter to pay away any part of them, or to claim retention for the expenses of the processes with Clark and his wife, the appearance in which was not authorized by the Bank, and which, besides, had been unsuccessful. Lord Alloway found,—1. ' That the assignation by M'Ewan to Mr. Macdonell was onerous to the extent of the sum advanced by Mr. Macdonell to M'Ewan at the time, and to the extent of all the obligations he had come under, and for relief of such sums as he might afterwards advance, or obligations he might come under, until he was interpellated by diligence upon the part of M'Ewan's creditors; and that, quoad ultra, he was an assignee in trust, accountable to M'Ewan himself, or to those creditors who by diligence stood in his right.—2. That the right which M'Ewan had in this trust-assignation was attached by the arrestments of the Bank of Scotland of 8th and 9th February 1819, both in the hands of Graham the common debtor, and in the hands of Mr. Macdonell the assignee, and that these arrestments precluded Mr. Macdonell from applying any part of the fund to advances or obligations for M'Ewan

‘contracted after that period, except to the whole expenses he might incur by rendering that claim effectual.—3. That the posterior arrestments used by the Bank in Mr. Macdonell’s hands, on 4th and 18th August 1820, attached any sums then in his hands derived from Graham, as well as those derived from any other quarter, which were not affected by the first arrestments, but subject also to any collateral payments or obligations, or expenses of process for M’Ewan, in which he had engaged before these arrestments were used.—4. That Mr. Macdonell was entitled to take credit for the small sum alleged by him to have been paid by him on account of Mr. M’Ewan’s deathbed and funeral expenses;’ and remitted to an accountant to ascertain what balance was due by Mr. Macdonell upon the above principles. Lord Eldin, on advising a representation by Mr. Macdonell, superseded consideration of it till the report of the accountant should be lodged; and the accountant having presented two views,—one proceeding on the assumption that Mr. Macdonell was not entitled to credit for sums paid and expenses incurred subsequent to the date of the arrestments,—and the other on the ground that he was entitled to such credit, his Lordship approved of the second of these views, and pronounced judgment accordingly. But the Court altered, and approved of the first view given by the accountant in his report, and preferred the pursuers, and decerned against the defender for the balance thereby reported as due, and for interest thereon as craved.’

H. DAVIDSON, W. S.—J. MACDONELL, W. S.—Agents.

No. 486.

J. BARBOUR, Pursuer.—*Sol. Gen. Hope—Marshall.*

H. M’MINN and Others, Defenders.—*Skene—Whigham.*

*Adjudication—Trust.*—A party having conveyed his estate to trustees for payment of debts; reserving an annuity to himself, and appointing the free residue to be divided to his children, and having thereafter contracted debt—Held that a creditor was entitled to adjudge his interest in the estate, reserving all objections contra captionem.

July 7. 1826.

1st Division.  
Lord Eldin.

D.

In 1811 M’Keur, proprietor of the lands of Blackmark, executed a trust-disposition of them in favour of M’Minn and others, proceeding on the narrative that he had involved himself in pecuniary difficulties by imprudent cautionary obligations, and that he had resolved to divest himself of his property for payment of these obligations, and other debts which he had contracted. He therefore conveyed the lands in trust to them; but it was specially provided and declared, that as I am now divested of my

‘ whole estate, real and personal, my said trustees and survivors or survivor of them, and such as may be afterwards assumed, shall be bound and obliged to pay to myself and Mrs. Elizabeth M’Minn alias M’Keur, my spouse, and to the survivor of us, during all the days and years of our lives, and the life of the survivor of us, for alimentary purposes only, and to the exclusion of our debts and debts, a free liferent annuity of £80 sterling, payable during my life, at such times and by such portions as my said trustees shall consider most for my benefit,’ &c. And in relation to the residue it was declared, that ‘ after the death of myself and my wife, the interest of the whole of my free residue of my estate and effects shall be liferented by Margaret M’Keur, my daughter, for alimentary purposes only, payable on her own receipt, &c., and after her death the whole residue itself shall be equally divided amongst any children I yet may have, and amongst the children of the said Margaret M’Keur of her present or any future marriage equally, share and share alike.’ The trustees were infest, and by means of a loan raised on the property they paid off the debts, and besides had in a great measure discharged the loan. They alleged, however, that by a subsequent deed M’Keur had assigned to them, in security of an advance of money, the reserved annuity of £80.

In 1823 and 1824 M’Keur granted three different bills to Barbour for upwards of £200, and these having been dishonoured and protested, Barbour brought a process of adjudication against the lands of Blackmark. In defence it was stated,—1. That the bills founded on were vitiated, and therefore could not be the foundation of any diligence;—and, 2. That M’Keur was divested of the lands, and that they now belonged to the defenders as trustees. To this it was answered,—1. That the bills were not liable to any legal exception;—and, 2. That the trust was a mere burden, for special purposes, on the right of M’Keur, who had the radical title to the lands; that the reversion belonged to him, and could not be conveyed to his children nascituris, so as to disappoint his creditors; and that therefore Barbour was entitled at all events to adjudge both that reversionary right and the annuity of £80. The Lord Ordinary dismissed the process; but the Court altered the interlocutor, and remitted to his Lordship to appoint the summons of adjudication to be intimated in due form, and, thereafter to pronounce a decree of adjudication, reserving all objections contra executionem.

Some doubt was expressed on the Bench, whether the proper diligence for attaching the reversionary interest of M’Keur was not

that of arrestment; but, without deciding this point, or the validity of the bills, the Court considered it the safest course to allow the adjudication to proceed, so as not to affect any right of preference, in the event of its being found to be effectual.

*Pursuer's Authorities.*—(1.)—Laidlaw, Aug. 3. 1774, (16941); Fairweather, Feb. 12. 1817, (F. C.); Sutherland, July 1. 1823, (ante, Vol. II. No. 421); Chitty, 103; Thomson, 209—(2.)—Donaldson, March 11. 1786, (8689); Spiers, Dec. 14. 1790, (8808); Campbell, Jan. 14. 1801, (No. 11. Ap. Adj.); Lockhart, Feb. 19. 1819, (F. C.); E. of Kellie, Nov. 12. 1821, (ante, Vol. I. No. 163); S. Ersk. 8. 29; M'Kenzie's Creditors, Feb. 6. 1792, (Bell's Cases, 326); M'Tavish's Creditors, Nov. 15. 1787, (12922); Brown, Feb. 1. 1820, (F. C.)

*Defenders' Authorities.*—(1.)—L. Bell, 304; Thomson, 204; Hamilton, June 17. 1825, (ante, Vol. IV. No. 84); Corrie, Nov. 26. 1825, (ante, Vol. IV. No. 186); Chitty, 103.

W. DABRYMPLE,—A. SCOTT,—Agents.

No. 487.

W. JARDINE, Petitioner.—*Penny.*

*Bankrupt*—Stat. 54. Geo. III. c. 137.—Held incompetent to remit a petition for approval of composition and discharge of a bankrupt under sequestration to the Lord Ordinary on the Bills during vacation, where the second meeting of the creditors for agreeing to the composition had not taken place.

July 7. 1823.

1st Division.  
H.

THE estates of Jardine having been sequestrated, he offered a composition which his creditors at the first meeting held under the statute entertained, and they appointed the trustee to call another meeting for the purpose of deciding on it; and to apply to the Court for a remit to the Lord Ordinary to approve of the composition, in the event of its being acceded to at that meeting. This meeting was to take place upon the 19th of July, and a petition was accordingly presented, praying for a remit to that effect; but the Court, after consulting with the Second Division, refused the remit as incompetent; and a similar judgment was at the same time pronounced on two other petitions of the same nature.

THE LORD PRESIDENT stated, that although there were several instances of such a remit having been granted, yet this had been done *per incuriam*; and that as the question had now been brought before the Court, they were unanimously of opinion, that where the second meeting had not been held, such a remit was incompetent; and that, accordingly, the Second Division had been in the practice of refusing to grant such remits, except in the case where the composition had been acceded to at the second meeting.

CAMPBELL and MACDOWALL,—Agents.



J. HARVEY, Complainer.  
T. and R. GIBSON, Respondents.

No. 488.

*Præf.—Arbiter—Letters of Supplement.*—Application for authority to cite havers and witnesses to appear before an arbiter must be made by petition to the Court of Session or Judge Ordinary, and not in the Bill-Chamber, for letters of supplement.

LORD MEDWYN reported a bill presented by Harvey, applying for letters of supplement to cite havers to appear before an arbiter in a submission between him and Gibsons, and his Lordship stated that it was the practice of the Bill-Chamber to grant such letters; but the Court, after consulting the other Division, directed his Lordship to refuse the bill, 'reserving to apply by petition to the Court or Judge Ordinary.'

July 7. 1826.

2d DIVISION.  
Bill-Chamber.  
Lord Medwyn.

J. S. DARLING, W. S.—W. and A. G. ELLIS, W. S.—Agents.

Mrs. WEBSTER OF COVENTON, Complainer.—*Jameson—Cowan.*  
Reverend W. SCHAW and SPOUSE, Respondents.—*Shaw.*

No. 489.

*Arrestment on Dependence—Alimentary Fund—Husband and Wife.*—An annuity, payable to a married woman, whose husband had renounced his *jus mariti*, and which, by her own act and that of a former husband, had been declared purely alimentary, having been arrested on the dependence of an action for payment of bills signed by her, while under coverture, along with her husband, refused to be ~~seized without caution~~, except to a partial extent necessary for her subsistence.

THE complainer Mrs. Webster, during the subsistence of her marriage with one M'Intyre, succeeded, by the death of her father, to considerable property, partly heritable and partly moveable. Both spouses having instituted mutual processes of divorce, and decrees of divorce having been mutually obtained, disputes arose regarding this succession, which were finally arranged by a trust-deed executed by the two parties. By this deed the whole property was conveyed to trustees, for the purpose of paying the debts of both parties, and of conveying one-third of the residue to M'Intyre, and the remaining two-thirds to the children of the marriage, under burden of an annuity of £875, which, along with the liferent of a house, was thereby reserved to Mrs. Webster; and it was provided 'that this annuity, and the rents of the house, being intended for her comfortable maintenance and support, shall be, and the same are hereby declared to be purely alimentary, and shall not in any way be affectable by her debts or deeds, nor assignable by her to any person whatever; and in case of her future marriage, the annuity and rents shall not fall under the *jus mariti*, or power of administration of any

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2d DIVISION.  
Bill-Chamber.  
Lord Medwyn.

'such husband.' Mrs. Webster subsequently entered into a second marriage with ~~Coxton~~, her present husband, who, by a postnuptial contract, renounced his ~~jus mariti~~; but they shortly afterwards separated, when she went to reside in Ireland. She had previously, however, signed along with him certain promissory notes to Belsh, their law-agent, whose executors, Mr. and Mrs. Schaw, after his death, used arrestments of a term's annuity in the hands of the trustees, *jurisdictionis fundandæ causâ*—and thereupon raised an action against her and her husband for payment of three of these promissory notes, amounting in all to £285, on the dependence of which they again arrested the term's annuity in the hands of the trustees. Of these arrestments Mrs. Webster presented a bill of loosing, without caution or consignment, on the grounds,—1. That the annuity was purely alimentary, and not attachable for payment of her debts, and was known by Belsh to be so;—and, 2. That being under coverture when she granted the notes sued for in the action on the dependence of which the arrestments were used, she was not bound by them, to the effect of subjecting either her person or property in payment. To this it was answered,—1. That she, having acquired the fund unfettered, could not, by her own act and deed, render it alimentary, and withdraw it from the diligence of creditors, and besides, that it exceeded the amount of a reasonable subsistence;—and, 2. That, in the depending action, circumstances might be established to show that the money for which the notes were granted was in rem versum, which would render her peculium liable in payment of these promissory notes, though granted while under coverture, and that the action could not be assumed to be unfounded. The Lord Ordinary reported the bill and answers; and the Court, having appointed a tutor ad litem to Mrs. Webster, passed it to the extent of £50, as a fund for subsistence, but refused it quoad ultra.

**LORD GLENELG.**—I do not say that the respondents are entitled to arrest the whole fund, but we cannot pass this bill in totâ without caution. The warrant for arrestment is not the promissory notes, but the process; and we cannot tell whether it is well or ill founded till it come into Court. The promissory notes being signed by the husband along with the complainer, is evidence of his consent; and though that will not operate to the effect of binding her person, it may do so to render it a good debt to affect her funds. It is too much, however, to allow the whole term's annuity to be arrested at once.

**LORD ROBERTSON.**—The complainer founds on two grounds,—1. That the fund is alimentary; but it was made so by herself; and though

a stranger, in settling a fund, may make it a condition that it shall not be effectable by debts, a party cannot do so himself.—2. That the bills were granted while under coverture; they were, however, granted by her and her husband, and it may so turn out that they will be available against her estate.

**LORD PRIMMLEY** concurred.

**LORD ALLOWAY**.—There are no grounds here to determine whether this is an effectual alimentary fund or not; but it may be so, as the complainer's first husband may have had the whole right to the fund; and the action on which arrestments are here used, is for payment of bills *ex facie* not good. We certainly cannot, therefore, allow her to be thus deprived of the whole annuity.

**LORD JUSTICE-CLERK**.—The complainer has failed in both propositions, but still she must not be allowed to starve.

*Complainer's Authority*.—1. Ersk. 6. 25.

*Respondents' Authority*.—Bell, i. 554. and ii. 196.

G. McCLELAND, W. S.—A. MONYPENNY, W. S.—Agents.

**R. DUFF and TRUSTEE, Petitioners.**—*Ivory*.

No. 490.

*Sequestration*—Stat. 54. Geo. III. c. 137.—The Court refused to remit to the Lord Ordinary, during vacation, an application for approval of composition, though accepted at the second statutory meeting, where the requisite concurrence had not been obtained and reported.

DUFF, having been sequestered, made an offer of a composition on his debts, which was entertained by the creditors present at the first statutory meeting called for the purpose of deciding on the offer, and was accepted by the creditors present at the second statutory meeting; but as there was not sufficient time to procure the requisite concurrence before the rising of the Court, the bankrupt and the trustee presented a petition, praying for a remit to the Lord Ordinary on the Bills during vacation 'to receive the trustee's report,—to judge if the offer of composition and security therefor have been assented to by the requisite number of creditors,' and thereupon to discharge the bankrupt, and exoner the trustee. The Court refused the petition.

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M'K.

**LORD JUSTICE-CLERK** stated that the Court had consulted the other Judges, who were agreed in holding that the Court had no power under the bankrupt statute to remit to the Lord Ordinary applications for approval of composition in such a stage as the present.

W. MURRAY, W. S.—Agent.

'such husband.' Mrs. Webster subsequent marriage with Cotton. postnuptial contract, afterwards separated; had previously, however, missory notes to J and Mrs. Schaw, nuity in the ha

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action of court and reckoning against commissions with his funds in the West Indies the century, and having lodged a condescend- claims to the extent of upwards of £30,000, inhibition against him on the dependence. presented a petition for recal of the inhibition alleging the action to be totally unfounded and barred by prescription, and founding on the judgment by the House of Lords in the case of Agnew, (ante, Vol. IV. No. 40.) The respondent insisted on his right to the security of this legal diligence, and refused to consent directly to a recal, on caution to a less amount than his whole claim; but stated at the Bar, that he would not oppose a recal, on caution to the restricted amount of £12,000. The Court recalled the inhibition, on caution being found for that sum.

**LORD ALLOWAY.**—In the case of Agnew, the House of Lords reversed the interlocutor making the finding of caution to the extent of £6000 a condition of the recal; and since the party here will not restrict his demand for caution to a reasonable sum, the Court must do it themselves. This claim has lain over for 28 years, and £12,000 is greatly too large an amount of caution to be demanded.

**LORD GLENELK.**—We cannot enter into the chance of success in the action. The claim being specific, and not for a random sum, as it was in the case of Agnew, I doubt whether it is competent, hoc statu, to restrict further than the party is willing to consent to, though, in the course of the process, such a change in the state of the claim may appear, as will warrant a further restriction.

**LORD JUSTICE-CLERK.**—The fixing the amount of caution, on a recal of inhibition, is a very delicate function to exercise. It is clear, however, that there must be some restriction here; but though I think £12,000 too large a sum, yet, as the party will not consent to restrict it further, I doubt whether we are warranted to do so.

**LORD PITMILLY.**—We are either bound to sustain the diligence to its full extent, or are entitled to interfere; and if we are entitled to interfere at all, why not go into the circumstances of the case, and

a reasonable discretion? I consider the condition of  
~~the~~ <sup>the</sup> extent of £12,000 to be an enormous hard-

A. GORDON, W. S.—J. MACDONELL, W. S.—Agents.

D. BARRY, Suspender.—*Sandford.*

No. 492.

J. SINGER, W. S. Changer.—*Jeffrey—D. Macfarlane.*

*Attorney's Certificate*—7. Geo. IV. c. 44.—*Law-Agent*.—Held,—1.—That an omission to take out an attorney's certificate may be cured under the above statute;—and,—2.—That an agent is entitled to charge under a decree obtained in his name for expenses in part incurred to his partner, before the agent was taken into partnership, and while he had no certificate,—the partner having had a certificate for that period,

In a litigation between Barry, a party on the poor's roll, and Geddes, Mr. Drysdale, W. S. acted as agent for the latter till May 1823, when he took Mr. Singer, the changer, into partnership. After this, they acted together as 'Geddes' agents; and on decree being given against Barry for an account of expenses commencing in 1822, and continuing till some time in 1824, it was allowed to go out in name of Singer, who charged Barry thereon, and had him incarcerated. Barry then presented a bill of suspension and liberation, on the ground that Singer had taken out no attorney's certificate during the years 1823 and 1824. In virtue, however, of a late statute, (7. Geo. IV. c. 44.) Singer having paid the arrears due to the Stamp-office, obtained a certificate for the years 1823 and 1824, and contended that Drysdale's certificate covered the previous part of the account. The Lord Ordinary reported the bill, which the Court refused.

July 8. 1826.

2d DIVISION.  
 Bill-Chamber.  
 Lord Medwyn.

J. SIMON, W. S. Agent.

No. 493.

FERGUSSON, HALLIBY, and COMPANY, Advocators.  
W. RICHARDSON, Agent for W. GRAHAM, Respondent.

*Process—Bill-Chamber—Law-Agent.*—An advocator having failed to expedite his letters of advocacy within ten days of the passing of the bill, and the respondent having obtained a certificate to that effect, found,—1.—That the respondent was entitled to his expenses, although the letters were afterwards expedite;—and,—2.—That, on the respondent leaving the country, the agent in the Inferior Court, in whose name decree for expenses there had gone out, was entitled to sist himself in his place.

July 8. 1826.

2d Division.

Bill-Chamber.

Lord Robertson.

M'K.

IN an action in the Sheriff Court of Dumfries at the instance of Fergusson, Halliby, and Company against Graham, the Sheriff assolizied Graham, and pronounced decree for expenses, which was allowed to go out in name of Richardson, the agent. Fergusson, Halliby, and Company then presented a bill of advocacy, which was passed; but not having expedite their letters within ten days, in terms of the A. S. 14th June 1799, Graham applied for and obtained a certificate from the Signet-office that no letters were expedite, and thereupon presented a note to the Lord Ordinary, craving to have his expenses in the Bill-Chamber awarded him. Subsequent to this, Fergusson, Halliby, and Company expedite their letters of advocacy; and in their answers to Graham's note they stated, that they had expedite the letters, without mentioning of what date. The Lord Ordinary refused the note in the course of the summer vacation 1825; and, on the meeting of the Court, a reclaiming note was given in for Graham, praying to have the Lord Ordinary's interlocutor altered, and expenses awarded.—Graham had, however, by this time left the country, and the cause was delayed till a mandate should be produced; but no tidings of him having been received for some time, Richardson, the agent in the Inferior Court process, craved to sist himself as a party for his interest in the expenses. This was opposed, on the ground that he had no interest in the Bill-Chamber expenses, which alone were at issue on this point; but the Court allowed Richardson to sist himself, and thereafter granted the prayer of the note.

W. LITTLE,—T. JOHNSTONE,—Agents.

W. BROCK, NEWBIGGING'S Trustee.—*Ivory.*

No. 494.

MRS. BROWN'S TRUSTEES.—*Pyper.*

Competing.

*Process*—18th Geo. III. c. 151.—A party entitled to object to an application under the above statute to be reponed against a final interlocutor, that it did not become so through inadvertency, although he has not reclaimed against the interlocutor of the Lord Ordinary allowing the application to be made.

THE interlocutor of the Lord Ordinary in the case mentioned ante, Vol. III. No. 424, finding Brock entitled to be preferred on the price of an heritable property, part of a bankrupt estate on which he was trustee, for the expenses of the sale, and of redeeming the hypothecated title-deeds, was not at the time reclaimed against on the part of Brown's trustees. Having lately, however, obtained the leave of the Lord Ordinary to apply to the Court to be reponed under the 48th Geo. III. c. 151, § 16, they presented a reclaiming note to that effect. This being opposed on the part of Brock, on the ground that the interlocutor had not been allowed to become final 'through inadvertency,' Brown's trustees contended, that as Brock had not reclaimed against the interlocutor of the Lord Ordinary giving leave to apply to be reponed, he was barred from now stating the objection. The Court, however, refused the note.

July 8. 1826.

2D DIVISION.

Lord Macken-

zie.

M'K.

Their Lordships were of opinion, that although it was competent to reclaim against the interlocutor granting leave, a party, by omitting to do so, was not barred from opposing on the merits the application to be reponed, which in the present case could not be granted, as there was no inadvertency.

GIBSON-CHAMPS and WARDLAW, W. S.—W. BALLANTINE, W. S.—  
Agents.

N. HUTCHISON, Advocate.—*Tait,*

No. 495.

M. THOMAS, Respondent.—*More—Maidment—Napier,*

*Semiplena Probatio*—*Bastard*.—Circumstances held to amount to a semiplena probatio in an action of filiation.

MARY THOMAS, having been delivered of a natural child on the 3d of February 1824, raised an action of filiation before the Sheriff Court of Lanarkshire against Hutchison, salesman for a victualling society in one of the suburbs of Glasgow, whom she alleged to be the father. A proof was allowed by the Sheriff, from which it appeared that, for two years prior to the birth of the

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zie.

M'K.

child, Thomas had resided at Renton, about twenty-five miles from Glasgow, and that she had only been occasionally there during that time, when she resided with a sister in Trades-town. It was, however, deponed to by the servants of two public-houses in Glasgow, that she and Hutchison on different occasions had some drink together in these houses,—sometimes after dark—that they had generally asked for a room to themselves, and on one occasion had gone away, because they could not be so accommodated; and one of these witnesses deponed, that on going into the room where they were, she had seen them ‘sitting together as lad and lass will do, but saw no familiarity pass between them.’ It was further deponed to, that on the Monday of the Glasgow sacrament, being the 6th of April 1823, they had walked out together from Glasgow to Rutherglen, where a brother-in-law of Thomas kept a public-house, and had been shown into a room together, where they had some drink—that Thomas’s sister and the servant had been in the room two or three times, and on one of these occasions the latter saw Hutchison sitting beside Thomas, with his arm round her neck, and kissing her, but they had found no fault with her for coming into the room; and this witness also deponed that they had afterwards left the house together, and that Thomas had not returned till one o’clock in the morning; but this latter circumstance was contradicted by the testimony of other witnesses. The Sheriff found that this proof amounted to a *semiplena probatio*, and allowed the pursuer’s oath in supplement. Hutchison brought an advocacy; but the Lord Ordinary remitted *simpliciter*, and the Court by a majority adhered.

LORD ROBERTSON alone thought that the judgment should be altered.

His Lordship observed—I do not consider that the circumstance of parties in the lower ranks of life being together in an open room in common tipping-houses affords any reasonable ground of suspicion, the more especially as it seems not to have created the least suspicion in the witnesses accustomed to the habits of that rank of life.

*Advocate’s Authorities.*—Stewart, Aug. 6. 1774, (F. C.); Crichton, June 18. 1806, (F. C.); Robb, Nov. 19. 1824, (ante, Vol. III. No. 218); Paul, Dec. 4. 1824, (ante, Vol. III. No. 263); Humphrey, Feb. 13. 1823, (I. Shaw’s Appeal, p. 111.)

D. SCALES,—W. and A. G. ELLIS, W. S.—Agents.



W. R. WILSON, Pursuer,—*Greenshields*.

No. 496.

MRS. PATERSON and HUSBAND, Defenders.—*Skene*.

*Factum*.—An apple having kept no regular vouchers of advances made for her of his niece while a child, and who was possessed of no property, but had a claim in dependence for a landed estate, held not entitled to claim repayment as debt, on her being found entitled to possession of the estate.

THE father of the defender Mrs. Paterson died in 1805, while she was very young, leaving her and his widow (who was the pursuer's sister) in great poverty, but with a claim on the part of the defender to an estate in this country. They were then in America; and having applied to the late Mr. Wilson, who resided in this country, and who was uncle of the widow, she, as acting for behoof of her child, authorized him and the pursuer, his nephew, to institute legal proceedings for the purpose of vindicating her right to the estate. At the same time she sent the defender to this country; and Mr. Wilson and the pursuer agreed to pay a Mr. Ogilvie, who had married her maternal grandmother, and with whom she resided, for her board and education. Mr. Wilson shortly after died; and the pursuer, who succeeded to the greater part of his fortune, undertook the sole burden of maintaining his niece, the defender, (to whom he was appointed factor loco tutoris,) and of carrying on her lawsuit, in which, after a long litigation, he ultimately established her claim to the estate in question. The defender was subsequently married to Mr. Paterson; and the pursuer some time thereafter raised an action against them for payment of his advances, both in the lawsuit, and for board, &c., in regard to the latter of which charges the pursuer had kept no regular vouchers or account. They agreed to pay the expenses of the litigation, so far as properly vouched, but disputed their liability for the other claims, on the ground that they were not vouched. It was not, however, expressly alleged that they had not been expended, or that they were at all unreasonable in amount; but it was pleaded that these advances must be considered as donations on the part of the pursuer to his niece, whose circumstances at that time were such that he could have had no expectation of being repaid, and no intention of keeping them up as a debt against her. The Lord Ordinary decreed for a certain amount, but, in reference to the lawsuit, disallowed charges for travelling expenses in coming into Edinburgh to attend consultations and proofs—for the expense of obtaining evidence of the defender's birth—for a fee to a physician consulted

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Lord Mackenzie.  
F.

on a question of deathbed involved in the lawsuit, and postages, as not regularly vouched; and also, for the same reason, sums advanced for the pursuer's passage to this country, and for board &c., in the years 1806-10. Against this interlocutor the pursuer reclaimed; but the Court by a majority adhered, except as to the charges for the expense of obtaining evidence of the pursuer's birth, the physician's fee, and postages, which they allowed.

The majority of the Court thought that the omission on the part of the pursuer to keep regular vouchers and accounts of his advances for board, &c. showed that they were in reality donations, and that he was not now entitled to claim repayment of them as a debt; while the minority (LORDS GLENLEE and ALLOWAY) were inclined to hold, that although he might not have intended to claim repayment, unless in the event of her succeeding in the lawsuit, and in that view might not have kept regular vouchers, yet that he was not thereby precluded from his present claim, unless the fact of his having made the advances were denied. And as to the articles expended in relation to the lawsuit, allowed by the Court, their Lordships were agreed that, in the circumstances of the case, such items might properly be charged by a factor loco tutoris, although he had not kept regular vouchers for them.

J. SMYTH, W. S.—A. GREIG, W. S.—Agents.

No. 497.

EARL OF FIFE, Pursuer.—*Jeffrey—Cockburn.*  
Sir J. DUFF and Others, Defenders.—*Thomson—Fullerton—Moncreiff.*

*Expenses prior to Appeal—Trust-Fund.*—Circumstances in which the Court, after an appeal and remit, refused to award, out of a trust-fund which was the subject of dispute, to the party ultimately successful, any expenses prior to the appeal, whether on points in which he had been successful or unsuccessful, except the expense of two Jury trials.

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F.

WHEN the action of reduction of certain deeds of the late Earl of Fife, (mentioned ante, Vol. IV. No. 241,) which concluded also for an accounting, came into Court, considerable litigation took place on objections to the pursuer's title to pursue, which were repelled by the Lord Ordinary and the Court, without any thing being said in their interlocutors as to expenses. The cause then proceeded on the merits, when two trials were had in the Jury Court on issues relating chiefly to the blindness of the late Earl, and the circumstance of the deeds under reduction not having been read over to him at the time of execution. On these trials verdicts were obtained for the pursuer, but no judgment was given as to expenses, the Jury Court not having then the

power to award expenses on such trials. These verdicts having been returned to this Court, in order to have them applied, the Lord Ordinary with certain findings in law reduced the deeds, and the Court adhered to his Lordship's interlocutor in so far as it reduced, and remitted to his Lordship to hear parties on the other conclusions of the libel; but neither in the interlocutor of the Lord Ordinary, nor in that of the Court, was there any finding as to expenses. Against this judgment a short petition was presented by the trustees, praying for leave to give in an additional petition. All the trustees, however, with the exception of Sir James Duff, having withdrawn, the additional petition was lodged in his name alone, and on advising it with answers, the Court adhered, and found the pursuer 'entitled to the expenses incurred by him in answering these petitions.' An appeal was then taken, in which the judgment of the Court on the question of title was affirmed, but that on the merits reversed, and a remit made, with certain findings in law, to order a new trial on the issue whether the deeds in question were not the deeds of the late Earl, and after the trial of such issue, to 'proceed further in the cause as shall be meet,' but without any declaration as to expenses. An issue in these terms was accordingly sent to a Jury, and a verdict obtained for the pursuer in regard to the principal deed, and the expenses of the trial were awarded by the Jury Court in his favour. Against the charge delivered at this trial, two bills of exceptions were taken by the defender Sir James Duff; but they were disallowed, and the pursuer found entitled to the expenses of the discussion, (see ante, Vol. IV. No. 241.) The Court having then, in respect of the verdict, reduced the deed, and found the pursuer entitled to his expenses since the remit by the House of Lords, Sir James Duff appealed; but the judgments were affirmed on the 22d of May last.\* The pursuer now further claimed out of the trust-funds the expenses, 1. Of the discussion on the title to pursue, in which he had been successful both in this Court and in the House of Lords; 2. Of the two Jury trials, (prior to the first appeal,) in which he had obtained verdicts in his favour; and, 3. Of the subsequent procedure in obtaining the judgment on the merits, which, however, had been reversed on appeal. To this claim it was objected,—1. That it was barred by the intervening appeal to the House of Lords, whose judgment was silent as to expenses.—2. That, except as to the question of title, Lord Fife had ultimately failed in the points maintained by him, by the reversal, under the first appeal, of the judg-

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\* See Wilson and Shaw's Appeal Cases, p. 166.

ments in his favour;—and, 3. That even although his claim were unobjectionable on the merits, and not barred by the appeal, yet having neglected to ask expenses at the time this Court had pronounced their judgment, and particularly having asked and obtained a partial award of expenses, viz. that of the answers to the reclaiming petition, he could not now demand them. In answer to these objections Lord Fife pleaded,—1. That there was no absolute incompetency in awarding expenses prior to an appeal; and that, as the House of Peers in this case had not determined the question of reduction, so as to be in a situation to judge of the expenses of the whole cause, but had remitted to the Court of Session to proceed further in the cause, their omission to find expenses did not preclude this Court from awarding them at the final issue.—2. That though unsuccessful on particular points, yet he had finally gained the cause; and as he did not ask decree for expenses against the trustees personally, but only out of the trust-fund, his case was stronger than those of *Hill* in the House of Lords, and *Crichton's Trustees* in the First Division, where parties who had been all along unsuccessful were allowed their expenses out of a trust-fund, the subject of dispute;—and, 3. That the omission to ask expenses at the time of judgment did not bar an after demand in cases where there was a remit to the Lord Ordinary, and the case was not exhausted, (as was held in *Taylor v. M'Kechnie*;)—that the partial expenses awarded were against Sir J. Duff alone as an individual, and independent of the general litigation; and that objections of this nature only applied to the case where expenses were demanded against the opposing party personally, and not where they were claimed merely out of the trust-fund which formed the subject of dispute. The Court awarded the expenses of the Jury trial, but by a majority refused the claim *quoad ultra*.

Lord Justice-Clerk.—We know nothing here as to who has right to the trust-property, and I therefore must throw out of view that circumstance, and consider this, as a claim between litigants in the ordinary case. As to the expense of the Jury trial, I think it ought to be allowed, for I consider that we are here exercising the functions of the Jury Court, as if the claim had been made at the time of trial; and the only question is, which party succeeded on the proof of the facts sent to issue? And although the House of Lords overturned our judgments on the points of law, they founded on the facts established by these verdicts. This claim, therefore, depends on totally different principles from the others, which I conceive the pursuer is precluded from now asking, because, although after a reclaiming petition had been given in for the whole trustees,

he obtained a partial award of expenses, he neglected to ask anything further, and even were the demand competent, it would be improper to award expenses after our judgments in favour of the pursuer have been overturned by the House of Lords.

The Judges all concurred as to the expenses of the Jury trials. As to the other expenses,

LORD ALLOWAY observed—The case is of much importance, and I have formed an opinion different from that which has been delivered: It is said that because, on a reclaiming petition, expenses of the answers were given, it precludes any further demand. But suppose the case had stood on the first interlocutor of the Court adhering to the Lord Ordinary's judgment on the reduction, and remitting to him to proceed in the further very important conclusions of the libel, one being for expenses,—the Lord Ordinary in this case was undoubtedly entitled to award the previous expenses. A petition was, however, given in, but the trustees except one withdrew, and it of course ceased to be the petition of any other person than Sir James Duff, in whose name alone the additional petition also proceeded; and accordingly the judgment on these petitions, awarding the expense of the answers, could not have reference to the whole cause, but to Sir James Duff alone, and he might have been compelled to pay the expenses out of his own pocket. If a case is decided out and out, expenses ought then to be asked; but if there is a remit to the Lord Ordinary to hold further procedure, the claim is reserved. I would apply the same principle to an appeal. If the House of Lords decide the case out and out, and do not give expenses, then I would not award them here; but if they do not so decide the cause, but remit to proceed further, the question of expenses is open. As to the propriety of awarding expenses here, it is of importance that they are asked out of the trust-estate. It is a very equitable principle, that when there is a fair, and reasonable dispute about a trust-fund, the expenses of both parties should be paid out of it. The trustees in this case have paid their expenses out of this fund, though unsuccessful; and I can see no reason why Lord Fife, who has succeeded, should not enjoy the same privilege. I can see no distinction between this case and that of Hill and Crichton's Trustees, nor between the expense of the Jury trials and the other procedure, particularly as to the title, where the judgment of this Court was affirmed on appeal; for the objection founded on the neglect to ask, and the intervention of the appeal, applies equally to the Jury Court expenses as to the rest.

LORD PRINGLE concurred, expressing only some difficulty as to the propriety of awarding expenses in those parts of the litigation where the judgments of this Court had been reversed.

LOORDS GLENLEIGH and ROBERTSON concurred with Lord Justice-Clerk.

*Pursuer's Authority.*—(1.)—*Mahony*, March 11, 1823, (ante, Vol. IV. No. 332);—(2.)—*Hill v. Burns*, (Wilson and Shaw's Appeal Cases, No. 11.); *Griethon*, May 12, 1826, (ante, Vol. IV. No. 364);—(3.)—*Taylor v. M'Kechnie*, June 9, 1821, (ante, Vol. I. No. 77.)

*Defender's Authority.*—*Reid*, Nov. 18, 1825, (ante, Vol. IV. No. 166.)

W. COOK, W. S.—J. and W. JOLLIE, W. S.—Agents.

No. 498.

M'KENZIE PATERSON, Claimant.—*Matheson*.

W. M'KENZIE, Respondent.—*Skene*.

*Multiplepinding*.—*Act of Sederunt*, 12th November 1825.—A process of multiplepinding dismissed, in respect intimation had not been given to the nominal pursuer, in terms of the act of sederunt.

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1st Division.

Lord Eldin.

H.

PATERSON raised an action of multiplepinding in name of M'Kenzie as pursuer, who having objected that no intimation had been made to him in terms of the act of sederunt, 12th November 1825, the Lord Ordinary dismissed the process. PATERSON then caused intimation to be given, and reclaimed, contending that the process ought not to have been dismissed, but only sisted till intimation had been made;—that a dismissal would be attended with very injurious consequences, as a great expense must be incurred in calling all the claimants in a new process;—and that, as the process had now been intimated, the interlocutor ought to be recalled. But the Court, holding that the enactment of the act of sederunt was imperative, and that the very object of it, and of the late Judicature Act, was to compel parties rigidly to observe the forms of process thereby prescribed, adhered to the interlocutor, with expenses.

JOS. GORDON, W. S.—W. M'KENZIE, W. S.—Agents.

No. 499.

Mrs. MILLER, Pursuer.—*D. of F. Cranston*—*A. Wood*.

J. DICKSON, Defender.—*Sol. Gen. Hope*—*Mathilla*.

*Disposition, Absolute or Revocable.*—A party having executed a deed proceeding on a narrative of being mortis causa, reserving her liferent, and dispensing with delivery, and having delivered the deed to the disponent, held entitled to revoke and alter it.

July 11, 1826.

1st Division.

Lord Meadowbank.

H.

Mrs. MILLER executed a disposition on the narrative, that, 'Considering the certainty of death, and the uncertainty of the time thereof, I have resolved to settle my affairs in such a manner, now that I am well in mind and judgment, so as to prevent all disputes thereanent after my death; and having re-

‘ceived many favours from John Dickson in Dornoch, my cousin-german, his family and friends, which are to be continued to me during my life; therefore, in gratitude, and for the love, favour, and affection I have and bear to the said John Dickson,’ she disposed and assigned to him all her goods whatsoever, nominating him her sole executor and universal legator, with power to him ‘to take possession, immediately after my death, of every thing that shall then belong to me,’ but under burden of certain legacies and payment of her debts; and she further declared this to be my last disposition and settlement of my affairs, revoking and recalling all preceding ones, reserving only my own liferent, and I dispense with the not-delivery hereof, and declare this to be valid and effectual to all intents and purposes, whether found lying by me, or in the custody or keeping of any other person, at the time of my decease.’ This deed was given to Dickson; and Mrs. Miller being afterwards desirous to alter it, and having required him to restore it, he refused to do so, and she thereupon brought an action to have it declared, ‘that it was competent to and in the power of the pursuer to alter and revoke, or to cancel or destroy the said disposition and settlement at her pleasure, and to dispose of her means and estate, heritable and moveable, in what manner she pleased, without her power of doing so being anyways affected or impeded by the said disposition and settlement;’ and she further concluded for restitution of the deed. In defence it was maintained, that the deed was irrevocable—that it had been delivered to the defender as disponent—that there was merely a reservation of the liferent, without any power of alteration or revocation—and that thereby she was effectually divested of the fee of her estate. The Lord Ordinary decerned and declared in terms of the declaratory conclusion, but, of consent of the pursuer, found it unnecessary to decide the second conclusion of the libel as to redelivery of the deed; and the Court unanimously adhered.

R. RUTHERFORD, W. S.—A. MONIFENNY, W. S.—Agents.

No. 500. Sir B. DUNBAR, Suspender.—*Sol. Gen. Hope—Maitland.*  
J. DAVIDSON, Charger.—*Piper.*

*Decree in Foro—Compensation.*—Held incompetent to suspend a charge given on a decree in foro by a party on the poor's roll, on the ground of counter claims which were illiquid.

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1st Division.  
Bill-Chamber.  
Lord Medwyn.  
H.

DAVIDSON, who sued in forma pauperis, having recovered a verdict for £89. 10s. of damages against Sir Benjamin Dunbar, obtained a decree of the Jury Court, on which he gave a charge. Sir Benjamin then presented a bill of suspension, stating that he had certain claims of compensation, on which he condescended, which he was about to constitute by actions which he had raised; and that as Davidson had sued in forma pauperis, and was consequently insolvent, he ought not, in the mean while, to be obliged to pay the sum charged for. The Lord Ordinary refused the bill, 'in respect the charge is given upon a decree in foro, and that the reasons of suspension are founded on claims not yet constituted, and for which the summonses are just come into Court;' and the Court adhered.

The Court, with the exception of Lord Craigie, were clearly of opinion that the interlocutor was well founded; but his Lordship stated that he had considerable doubts in consequence of Davidson being insolvent, and thereby unable to pay the debts in the event of their being constituted against him.

A. W. GOLDIE, W. S.—D. CLYNE,—Agents.

No. 501. J. YOUNG FORRESTER, Pursuer.—*Jeffrey—More.*  
Mrs. MARY HUTCHISON and HUSBAND, Defenders.—*D. of E.*  
*Cranstoun—Moncreiff—Rutherford.*

Et è contra.

*Succession—Clause.*—The destination in the dispositive clause and obligation to infest in a deed of entail being to the institute and the 'heirs-male of his body, whom failing, the other 'heirs, &c. after specified,' but in the preteritory which contained the whole nomination of heirs and provisions of entail, and which was stated to be for effectuating the above infestment, the destination being to the heirs generally of the institute's body, whom failing, to certain substitutes and their heirs-male,—Held,—1.—That the dispositive was the controlling clause;—and,—2.—That an heir-male of a posterior substitute took before an heir-female of the body of the institute.

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2d Division.  
Lord Medwyn.  
M.K.

THE late John Forrester executed an entail, which, after stating that the estate of Culmuir had been in his family for 300 years, and that great part of what had belonged to his ancestors had been wasted and dilapidated, proceeds as follows:—For



'the continuance of what remains of the foresaid ancient inheritance with my own children and posterity, and other considerations me moving, under the reservations and conditions after mentioned, I sell and dispose to William Forrester, my eldest son, and the *heirs-male* of his body, whom failing, my other heirs of tailzie and provision after specified, heritably and irredeemably, all and whole these my lands of Easter Culmuir, &c. in which lands, &c. I bind and oblige myself and my heirs, &c. to infest and seise the said William Forrester and his above named; whom failing, my other heirs of tailzie and provision after mentioned, heritably and irredeemably, by resignation thereof in the hands of my respective superiors of the same, in manner after expressed, to be holden of them in the same manner, &c. as I or my forebears held, hold, or might have holden the same ourselves: And for effectuating the foresaid infestment, I hereby make, constitute, and ordain, &c. to resign, &c. as I by these presents resign, renounce, and surrender all and whole my said lands of Easter Culmuir, &c.—' in the hands of my immediate lawful superiors thereof, in favour and for new infestment thereof, to be made, given, and granted to the said William Forrester, my eldest lawful son, and the *heirs* of his body; whom failing, to John Forrester, my second son, and the *heirs-male* of his body; whom failing, to John and Robert, his third and fourth sons, and any other *heirs-male* to be procreated of his own body, and the *heirs-male* of their bodies respectively; whom failing, to Mary, Janet, and Elizabeth Forresters, his daughters, in their order, and the *heirs-male* of their bodies respectively, succeeding without division; and failing of my said daughters and the *heirs-male* of their bodies, to the *heirs-female* of my respective children, in the same order as is above described with respect to the *heirs-male*.' This procuratory of resignation further engrossed all the conditions, prohibitions, and irritancies of the entail, and, inter alia, a prohibition to alter the order of succession. William Forrester, the institute under this deed, predeceased the entailer, leaving an only son, who again left two sons, of whom the elder died without issue, and the younger was Major William Forrester, father of Mrs. Hutchison. None of the prior heirs had made up titles, and Major Forrester having expedite an erroneous service, took infestment on the unexecuted procuratory, and thereupon disposed the estate to himself and his heirs whatsoever, omitting the whole conditions and provisions of the entail; and having been infest on this disposition, he died in 1826. On this two actions were raised, the one at the instance of his only child, Mrs. Hutchison, and the other at the instance

of John Young or Forrester, the eldest son of Elizabeth Forrester, the third daughter of the entail, (the heirs-male of all the previous substitutes having failed,) Both of these actions concluded for reduction of Major Forrester's titles and disposition; but Mrs. Hutchison's concluded further to have it declared, that 'the heirs-general of the body of William Forrester, the institute and eldest son of the entail, are entitled to take up the suspension before the heirs-male of the bodies of the younger sons and daughters of the said entail who are named in the said entail;' while, on the other hand, Young's action concluded to have it found, that the estate had fallen to him as the next substitute under the entail. For the latter it was contended,—1. That although the destination in the procuratory was to the 'heirs' of the institute instead of the 'heirs-male,' as in the dispositive clause, yet the obligation to infeft being likewise in favour of the heirs-male, and the procuratory being expressly stated to be for effectuating this infeftment, it must be construed and regulated by the terms of the dispositive clause, which, as to destination, was always the leading and regulating clause in a deed, and under which here, the heirs-male only of the institute, and not his heirs-female, succeeded before the heirs-male of the several substitutes;—and, 2. That this was the meaning of the entail was clear, not only from the terms of that clause, but also from the heirs-female of the institute being called by the after substitution, (on failure of the daughters and their heirs-male,) of 'the heirs-female of my respective children, in the same order as is above described in respect to the heirs-male.' On the other hand, Mrs. Hutchison pleaded,—1. That a procuratory was in itself a perfect form of conveyance without the necessity of a disposition, and as the whole destination and provisions were in the present case contained in the procuratory, (which in fact alone constituted the entail,) it must be considered as the regulating clause, even if it were in direct opposition to the destination in the dispositive; but further, that there was no such opposition, for the destination in the dispositive clause being on failure of the institute and the heirs-male of his body, to the 'other heirs of tailzie and provision after specified,' the destination in the procuratory, to the institute and the heirs of his body generally, included the heirs-male, and also the heirs-female, so that the heirs-female were in fact the first of the 'other heirs' after specified, called in the dispositive clause after the heirs-male, and as such were entitled to take the estate before the heirs-male of a posterior substitute; and, therefore, (even were the dispositive clause to regulate,) although a grand-daughter of the institute could not have taken under the destination to heirs-general

neral in the procuratory, in consequence of the heirs-male being first called in the dispositive clause, yet she would not thereby be prevented from taking before an after substitute,—the destination in the dispositive clause not interfering, in such a case, to alter or modify the clear destination in the procuratory, which called the heirs-general of the institute before any of the substitutes;—and, 2. That in regard to the plea founded on presumed intention, much stronger circumstances had been disregarded in the case of Urrard. The Lord Ordinary, in the action at Young's instance, found 'that it is not disputed that the pursuer is the eldest son of Elizabeth, third daughter of the entailor, and therefore, that, by the failure of prior substitutes, he is now nearest heir of entail under the said deed;' and his Lordship accordingly reduced Major Forrester's titles in the action at Young's instance, while in Mrs. Hutchison's action he found, that she 'is not, in terms of the entail, entitled to take up the succession as nearest heir of entail,' but 'that she is a substitute heir under the clause, whereby, failing the daughters of the entailor, and the heirs-male of their bodies, the succession is to devolve on the heirs-female of his said respective children, in the same order as is prescribed in respect to the heirs-male;' and though having therefore a title to pursue reduction of the deeds challenged by her, yet that any decerniture to that effect was unnecessary, as they had been set aside in Young's action, and he accordingly dismissed her action. She reclaimed, but the Court by a majority adhered.

**LORD JUSTICE-CLERK.**—The procuratory might undoubtedly have constituted the whole entail; but here we have a regular dispositive clause, with an obligation to infest the heirs there mentioned, and the procuratory is for effectuating this infestment. Although, therefore, if the words in the dispositive clause had not been clear, we might have been obliged to go to the procuratory to explain them, yet, as they are here perfectly explicit, we must give effect to the destination in the dispositive clause, which is to the heirs-male, and not the heirs-general of the institute, whom failing, to the other heirs mentioned in the procuratory; and which destination I conceive to be perfectly inconsistent with that in the procuratory, which would, in particular events, admit a female to the succession, while there were still an existing heirs-male of the body of the institute. And in thus giving effect to the dispositive clause, I wish it to be distinctly understood that I do not entertain the slightest doubt of the propriety of the decision in the case of Urrard, in which I concurred, but that I rather follow out the principle of

it, by giving effect to the clear declaration of the entail in the dispositive clause.

LORDS GLENLEE and PITMILLY concurred.

LORD ALLOWAY.—I consider this to be a most important question, and I regret that my opinion in regard to it differs very considerably from that which has been delivered. There are two points necessary to be decided,—1. Whether the dispositive clause or the procuratory is the controlling clause;—and, 2. Whether there is any discrepancy between the two which cannot be reconciled.—1. Although there is here a dispositive clause with an obligation to invest, the entail is entirely executed in the procuratory of resignation, and a settlement may be as well, and is more frequently executed by a procuratory than a disposition. It is here the only important clause, as by it alone the heirs of entail are named; and the conditions, &c. provided, and being also subsequent to the disposition in order, if they differ, the procuratory must control the dispositive clause, a strong confirmation of which rule appears in the case of Sutherland. But, 2. The other question is still more important, whether, even holding the dispositive to be the controlling clause, it cannot be reconciled with the procuratory. Now, giving every effect to the disposition, what does it settle? It disposes to the heirs-male, whom failing, to the parties called in the entail. Then are not the heirs-male of the body called in the procuratory?—They are the first called under the general term, heirs of the body. There was nothing to prevent the entail first calling in the procuratory heirs-male, and whom failing, heirs-female, in express words, which would not be contrary to the disposition; and if so, can he not do the same thing by the equivalent phrase of heirs-general of the body? Suppose the destination in the disposition had been to the heirs-general of the institute, and in the procuratory first to his heirs-male, whom failing, the heirs-female, would the entail have had no power to make this alteration in consequence of the general destination in the dispositive clause? I apprehend that he would have had such power. Again, suppose the institute's son had had both a son and a daughter, the destination in the dispositive being, as here, to the institute's 'heirs-male,' could not the entail in the procuratory have called this son and his heirs-male, whom failing, the daughter nominatim? He certainly might, and if so, there is an end of the question, for the general destination to heirs produces exactly the same effect. And as the technical meaning of this destination is clear, I conceive that nothing can be more dangerous than to allow a construction of distinct technical terms, according to views of what may have been the intention of the party, contrary to the just principles fixed in the case of *Unard* and several other decisions.

*Mrs. Hutchison's Authorities.*—Sutherland, Feb. 6. 1801, (F. C.); Baillie v. Tenant, June 17. 1768, (F. C.); Hay of Lumphin, July 24. 1788, (F. C.); Richardson, July 5. 1821, (ante, Vol. 1. No. 131); Affirmed in H. of L. April 8. 1824.

**J. MACARA, W. S.—CANNIEGY and SHEPHERD, W. S.—Agents.**

**J. MENZIES, Petitioner.—Cockburn.**

**No. 502.**

**J. and J. BERRY, Respondents.—Jameson.**

*Prisoner—Debtor.*—Warrant granted for liberation of an imprisoned debtor to attend diets of proof, during vacation, in a process of cessio, on finding caution to return to jail.

MENZIES having been incarcerated for payment of debts amounting to about £100, raised a process of cessio, in which he stated his whole debts to amount to £7618. The Court having allowed a proof of certain allegations on the part of the opposing creditors, with a conjunct probation to Menzies, he presented a petition, praying for warrant of liberation to attend the diets of the proof during the vacation. The Court granted warrant 'to the Magistrates of Canongate to liberate the petitioner, 'to the effect of his attending the diets of proof to be led by 'the parties, on condition of his finding caution to the extent 'of £100 to return to jail within three weeks of the date of 'liberation for attending each diet of examination,' and authorized the Magistrates and the keepers of the tollbooth 'again to 'receive and detain the person of the said James Menzies.'

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**2d DIVISION.**

**B.**

**A. GIFFORD,—A. GREIG, W. S.—Agents.**

**T. FALCONER and Others, Advocators.—Jeffrey—More.**

**No. 503.**

**T. SHEILLS and COMPANY, Respondents.—Skene—Gillies.**

*Process—Stat. 6. Geo. IV. c. 120.*—Judgment of Lord Ordinary recalled, in respect pronounced before record made up.

IN an advocation from the Dean of Guild Court of Glasgow, the Lord Ordinary, without having made up and closed the record, in terms of section 70. of the Judicature Act, dismissed the advocation as incompetent, 'in respect the bill of advocation 'in this case was not intimated in the Inferior Court within fifteen days after the date of the interlocutor of the Dean of Guild 'of Glasgow, allowing a proof, in terms of the Act of Sederunt '12th November 1825, section 71.' The advocators reclaimed against this interlocutor, and the Court, without giving any opinion on the merits, recalled it, and remitted to his Lordship to

**July 11. 1826.**

**2d DIVISION.**

**Lord Cringletie.**

**B.**

make up the record, before pronouncing judgment, in terms of section 70 of the statute.

W. ALLESTREE, — J. THORPURN, — Agents.

No. 504.

R. WILSON, Pursuer. — *Henderson*.

EXECUTORS of the late DUKE of QUEENSBERRY, Defenders.

*Process* — 6. *Geo. IV. c. 120*. — Action allowed to be abandoned, with reservation to bring a new action.

July 11. 1826.

2<sup>d</sup> DIVISION.  
Lord Cringletie.  
F.

WILSON raised an action of damages against the Executors of the Duke of Queensberry, founding on a particular missive of sub tack. After the Lord Ordinary had pronounced an interlocutor assolzieng the defenders, Wilson discovered another missive on which he was desirous to found, instead of that already libelled on in his summons; and accordingly, in a reclaiming note, he prayed to be allowed to abandon this action, reserving to bring a new action, or else to amend his libel so as to found on the newly discovered document, and depart from the former. The Court dismissed the action, reserving to him to bring a new one.

T. EWART, W. S. — LAMONT and NEWTON, W. S. — Agents.

No. 505.

EARL of HADDINTON, Suspender. — *Sol.-Gen. Hope* — *Robertson*.

A. DUFF and Others, Chargers. — *Keay* — *T. A. Duff*.

*Royal Park* — *Road Acts*. — Road Trustees interdicted from quarrying within the Royal Park of Holyrood.

July 11. 1826.

2<sup>d</sup> DIVISION.  
Bill-Chamber.  
Lord Medwyn.

LORD HADDINTON, as Keeper of the Royal Park of Holyrood, presented a bill of suspension and interdict against two persons employed by the Middle District Road Trustees, to have them interdicted from quarrying stones out of Salisbury Crag, situated within the Royal Park. To this bill answers were given in by the Trustees, who, while they admitted the great injury done to the Crag by their operations, and expressed their intention not to quarry more than a certain piece of rock which had been formerly pointed out to them by Lord Haddinton's agent as most proper to be worked, and the taking away of which would not in the least injure the rock, and then to cease further operations, contended, — 1. That they were entitled to quarry stones for metal for the public road in virtue of several road acts, and that they had exercised that privilege for upwards of a century, since the first turnpike road act was passed in the reign of Queen

Anne;—and, 2. That as the Officers of State did not interfere, Lord Haddinton had no title to apply for an interdict against them, the more especially as he, by his tenants, continued to quarry the same rocks. The Lord Ordinary having reported the bill and answers, the Court unanimously passed the bill, and granted the interdict.

**LORD GLENLEE.**—Lord Haddinton has a perfectly good title, as Keeper, to prevent any person from quarrying, not having a right to do so. I doubt if the acts of Parliament give the Trustees power to quarry in the park, but they have had long possession, and may thereby have acquired a right; but, whenever abuse is admitted, their title ceases. Now, it is admitted by the Trustees that the abuse is intolerable; and the only thing I hesitate about is in regard to that piece of rock, which I am not satisfied it would be an abuse to quarry.

**LORD ROBERTSON.**—My difficulty is, whether we can invert such long possession in this summary way.

**LORD FITZMILLER.**—The Trustees have a statutory right, no doubt; but it must be subject to some restriction and reasonable limitation, and the Keeper is entitled to apply for an interdict to prevent abuse.

**LORD ALLOWAY.**—Lord Haddinton, though he has no feudal right of property, is Keeper of the Royal Park, and as such he is entitled, and it is his duty to prevent all dilapidation and destruction of the beauty of the Park. The Trustees have certain rights of quarrying given them by the road statutes, but it is under several exceptions: they cannot go into a gentleman's park, and quarry there; still less can they do so in a Royal Park. It has been decided, that though the King be not residing at the palace, no diligence can be executed there. Every privilege of a royal residence attaches to Holyrood-house, and must be extended to the Park also; and the road acts give no power whatever to the Trustees to quarry a single stone in any part of it; nor has Lord Haddinton any power to allow them. We are bound, therefore, to grant the interdict to the full extent craved.

**LORD JUSTICE-CLERK.**—This is the park of one of his Majesty's acknowledged residences, and it is impossible to deny to the park of the Sovereign the exemption enjoyed by the private park of any of his subjects. At the same time, if Lord Haddinton keeps quarries open, I am not prepared to say that the Trustees may not demand stones there, tendering payment for them. They do not, however, take this course; and as the Keeper complains of abuse, I agree that the interdict must be granted.

A. MONTPENNY, W. S.—H. WATSON, W. S.—Agents.

No. 506.

OFFICERS OF STATE and LORD DUNDEE, Suspenders.—

*Sol.-Gen. Hope.*Rev. J. BRENNER, Charger.—*D. of F. Craistoun—Whigbam.*

*Manse—Personal Exception.*—A clergyman having, by application to the presbytery, obtained the erection of a new manse by the heritors, on a piece of ground not originally the glebe of the parish; and having, after a possession of upwards of thirty years, given it up to a party claiming right thereto, without dispute, or intimation to the heritors; and having obtained decree from the presbytery for a second manse to be built on the old glebe—the Court suspended *in hoc statu*, till he should raise a proper action for determining the right to the former manse; and held that heritors were not barred from bringing a suspension, after the clergyman had nearly erected the manse out of his own funds, no demand having ever been made on them, and they being non-resident.

July 11. 1826.

2d DIVISION.

Lord Mackenzie.

sic.

M.K.

IN the year 1782 the Reverend James Bremner, incumbent of the united parishes of Walls and Flotta, applied to the presbytery of Cairstoun to have a new manse erected on the lands of North Seater, which had previously formed part of the estate of Mr. Moodie of Melsetter, and as to which an excambion for the old glebe had been agreed on between Mr. Moodie and Mr. Bremner, but, as was alleged by the latter, had not been formally or actually completed. The presbytery awarded a new manse, and gave decree against the heritors for a certain sum, appointing Mr. Bremner undertaker for erecting the building. He accordingly took this charge, and received the sum decreed for against the heritors, and likewise applied for a grant of the vacant stipend, and the materials of the old manse, the latter of which he obtained, and under his directions the manse was erected on these lands of North Seater, which he continued to possess unchallenged, (along with the old glebe, as he alleged,) till the year 1821, when Heddle, a gentleman who had lately purchased Mr. Moodie's property, required him to remove, on the ground that the excambion had never been completed. Mr. Bremner immediately complied with this requisition, without intimating it to the heritors; but he presented a petition to the presbytery, stating that he was about to be removed, and praying them 'to consider the case, and take such steps as the law directs for building a new manse, &c. on the glebe, and with as little delay as possible.' On this petition the presbytery pronounced a deliverance, appointing Mr. Bremner to serve an edict from the pulpit, and intimate by letter to the heritors 'that a new manse and offices, &c. are to be built upon the glebe, and requiring the heritors to come forward with a plan and specification against next meeting of presbytery; under certification, that if they failed, the presbytery would appoint a committee for that pur-



pose. In consequence of this intimation, the Officers of State, on the part of the Crown, and Lord Dundas, the principal heritors of the parish, directed their agent to write to the moderator of the presbytery, stating that they could not consent to the clergyman giving up his manse on North Seater, and that they opposed the erection of a new manse, on the ground that Mr. Heddle had no right to remove him from North Seater, at all events till he should succeed in an action of declarator against the heritors. This letter was read at the meeting of presbytery in March 1821, but no one attended personally on the part of the Officers of State or Lord Dundas to oppose Mr. Bremner's petition; and the presbytery, at a subsequent meeting in November 1822, decerned against the heritors for £676, for the purpose of building the new manse, and appointed Mr. Bremner their overseer to carry the decree into execution. He accordingly proceeded with the erection of the manse on the original glebe, and without calling on the heritors for contribution of their proportions of the sum decerned for till 1824, when he had expended out of his own funds £400; but having then made a demand on the Officers of State and Lord Dundas, they brought a suspension, on the ground, that having acquired a right by the decennialis et triennialis possessio to the lands of North Seater, and the manse which had formerly been built thereon by the heritors on his own application, he was not warranted to cede the possession, without, at least, allowing the heritors an opportunity to defend their right in a Court of Law, and having done so, he could not call on them to build a new manse; and that although he had not been interrupted in the building of the new manse, that had been owing to his own omission to make any demand on the heritors, whereby, not being resident, they could not be aware of his proceedings. To this it was answered by Mr. Bremner, that he did not possess North Seater as part of his benefice, but under a lease from Mr. Moodie; and that the suspenders were now barred by acquiescence in not appearing to oppose the presbytery's decree, or suspending it immediately after it was pronounced. The Lord Ordinary suspended the letters in hoc statu, without prejudice to the minister of Walls and Flotta again insisting as charger in this process, after he shall have brought forward a proper action against proper parties for trying the question, whether the manse formerly built for him, in property or in possession for a time, be truly part of the benefice of that parish or not? The Court adhered.

The Lord Ordinary observed in a Note:—"It seems clear to the Lord Ordinary that the minister ought not to have given up the

actual manse, built under his own direction, without fairly trying the question of right, or at least putting it fully in the power of the heritors to defend the rights of the benefice for their own advantage, if they chose. He having, however, voluntarily done this, it appears to the Lord Ordinary equitable still to require him to raise a proper action of declarator for this purpose, before allowing the charge for the expenses of a new manse to proceed. If he suffer inconvenience for giving up one manse before another was built, or his right to it cleared, he must blame himself. The Lord Ordinary may also observe, that the alleged long lease from Mr. Moodie is not produced; and the mere payment of some small rent by the minister, of itself, even if admitted, proves little, since the minister says himself that he kept both the old glebe, and the lands that were proposed to be exchanged for it."

The Judges concurred generally in this opinion.

MURRAY and LOGGIE, W. S.—J. KEN, W. S.—Agents.

No. 507. SIR W. BAILLIE and Others, Suspenders.—*Moncreiff—Jardine.*  
J. M'KENZIE, Changer.—*D. of F. Cranstoun—Skene.*

*Road Act.*—Held that a clause in the general road act prohibiting buildings within 25 feet of the centre of the road did not repeal or supersede a prohibition in a local act against buildings within 30 feet, but that it was still effectual to prevent buildings within that space.

July 11. 1835.

2d DIVISION.

Lord Cringletie.

F.

THE general road act (4th Geo. IV. c. 49,) proceeding on the preamble, that 'it is expedient that the laws now in force for the general regulation of turnpike roads in that part of Great Britain called Scotland should be consolidated, and that further regulations should be made in regard to the same,' and that 'It is of great importance that one uniform system should be adhered to in the laws for regulating the management and maintenance of turnpike roads throughout that part of Great Britain called Scotland,'—enacts, 'That from and after the passing of this act, all the enactments, provisions, matters, and things in this act contained, shall extend to all acts of Parliament now in force, and to all acts of Parliament which shall hereafter be passed, for making, widening, turning, amending, repairing, or maintaining any turnpike road in that part of Great Britain called Scotland,' (save and except as to such enactments, provisions, matters and things, as shall be expressly varied, altered, or repealed by any such act as shall hereafter be passed.) And by one of the clauses it is provided, 'That no houses or other buildings shall be erected, nor any enclosures made along the sides of any turnpike road, within the distance of 25 feet from the centre

‘thereof; and no place out of which the trustees of any turn-pike road have been in the use of taking materials previous to the passing of this act, shall be enclosed, until the proprietor or occupier of the lands shall have given one month’s previous notice at least of his intention to the trustees of the said road; and if he fail so to do, he shall not be entitled to any compensation for the value of the said houses, buildings, or enclosures, in case the said trustees shall at any future time think it necessary to demolish the same, for the purpose of widening the road.’ By a prior local act, passed in the 50th of the late King’s reign, for the Shotts and Airdrie road, leading into the city of Glasgow, it had been provided, ‘That no person shall make or erect any house or building, except only fences or walls not exceeding six feet in height, within 30 feet of the centre of any of the said roads; and every person so offending shall be obliged, when desired to do so by any two or more of the said trustees, immediately to remove any such fence or building; and upon their failing to do so within 30 days from the time that a notification in writing shall have been given by any two trustees of the encroachment, it shall be lawful for the trustees or their surveyor to cause the said building to be removed, and to charge the offender with the expenses of doing so, to be recovered and applied in the same manner as other penalties and forfeitures are directed by this act, or as the trustees shall think proper to direct.’ Founding on this clause in the local act, Sir William Baillie &c., trustees on the Shotts and Airdrie road, brought a suspension and interdict to have M’Kenzie prohibited from erecting a house which he had commenced building within 30 feet, but beyond 25 feet of the centre of the road. Against this suspension M’Kenzie pleaded, that as the provisions of the general act are declared to extend to all prior and subsequent road acts, for the purpose of establishing one uniform system of management, therefore, wherever any regulations are laid down in the general act, these must supersede the regulations on the same subject in any local acts in any of those matters intended to fall within the uniform system of management; and accordingly that the prohibition in the general act of all buildings within 25 feet of the centre of the road, entirely superseded that in the local act against erections above six feet high within 30 feet of the centre. To this it was answered, that the general act not having repealed the provisions of the local statute, but being merely declared to extend to such statutes, did not necessarily supersede their provisions, unless inconsistent with or contrary to the general act; so that, if the local act had only prohibited

buildings within 20 feet of the centre of the road, the general act must have superseded that, so as to prevent buildings within 25 feet, because the one was truly inconsistent with the other, but as the local act here prohibited buildings within 30 feet, that included within it the prohibition in the general act, and therefore there was no inconsistency, as full effect would be given to the general act, by carrying the prohibition in the local act into execution; and that this construction was confirmed by the circumstance, that since the passing of the general act, (which is declared to extend to future as well as prior statutes,) two local acts had been obtained for roads leading, like this, into Glasgow, which contained the very same prohibition as to building with that in the Shotts and Airdrie act. The Lord Ordinary repelled the reasons of suspension, and found the letters orderly processed; but the Court altered, and suspended simpliciter.

**LORD JUSTICE-CLERK.**—After all the consideration I have given to this case, I cannot view this clause in the general road act as a permissive clause, allowing buildings in all cases within 25 feet of the centre of turnpike roads. The leading feature in the clause is the notice required to be given, before any person erects any building or enclosure within 25 feet of the centre; but there is nothing declaring that all prohibitions in other acts were to cease and determine. It is no doubt declared, that all provisions in the general act shall extend to all other road acts, and full effect must, under this, be given to the clause regarding buildings, so that every road not having a prohibition so extensive shall benefit by it; but there is nothing in it to restrict to the same measure the greater extent sanctioned by other acts; and that the Legislature did not intend that it should have such a restrictive effect, derives great confirmation from the circumstance, that in two local acts for roads leading, like this, into Glasgow, and subsequent to the general act, the very same prohibition as to building is inserted as that in the Shotts and Airdrie act. Take the case, that, for the benefit of a great city, a road entering to it should be provided to be 100 feet wide, could any one, in virtue of the general act, build within 25 feet of the centre, and thus make it a road of only 50 feet? I conceive not, and that the general act cannot narrow the powers of any former act, unless where inconsistent with or in opposition to its provisions.

**LORD PRINGLE.**—I formerly thought that the word 'extend' in the general act meant that its provisions should supersede entirely all those on the same matters in other acts; but, after again attending to it, and particularly considering the interpretation put on it by the Legislature in the two late acts alluded to, I am now

tified that the Lord Justice-Clerk's construction of the statute is right.

LORD ALLOWAY likewise concurred.

LORD GLENLEE agreed with the Lord Ordinary.

J. G. HOPKIN, W.S.—JAMES BALFOUR, W.S.—Agents.

W. GALLOWAY, Petitioner.—*Forsyth—Shaw.*

No. 508.

A. BRUCE, Trustee on his Sequestrated Estate.—*Jameson—Whigham.*

*Bankrupt—Discharge—Stat. 54. Geo. III. c. 137.*—Held that a bankrupt under sequestration is entitled to be discharged, on the Court being satisfied that he has the requisite concurrence, although the trustee has refused to grant a certificate to that effect; and although he has stated objections to the regularity of the affidavits and claims of creditors concurring.

GALLOWAY, a sequestrated bankrupt, applied for a discharge, with an apparent concurrence of four-fifths of the creditors who had claimed to be ranked on his estate; but Bruce, the trustee, refused to grant a certificate that there was the requisite concurrence. At the same time, however, the trustee gave in a petition for discharge and exoneration from the office of trustee, which was granted on a remit by the Lord Ordinary, whose judgment was kept open by a reclaiming petition by one of the creditors, and which the Court superseded, to prevent his final exoneration and discharge till the issue of Galloway's application, which was remitted to Lord Medwyn to receive a report from the trustee of his reasons for withholding his certificate of concurrence. The trustee accordingly gave in a report, stating several objections to the conduct of the bankrupt, (which were afterwards answered completely to the satisfaction of the Court,) but founding chiefly on an alleged want of concurrence of true creditors; and he stated objections to the regularity of the affidavits and claims of several creditors who had granted their concurrence, of whom some had been ranked prior to the last dividend, and others only subsequent to it. In answer to this report Galloway gave in a condescendence, in which, besides contending that the objections were in themselves not well founded, he pleaded that the trustee had no right to scrutinize claims, except to the effect of preventing their drawing a dividend; that no one but a creditor was entitled to object to their claims; and that in a question of discharge, it was only necessary to have the concurrence of a certain number of the creditors, whether they were ranked or not; and therefore the objections to the regularity of the affidavits were irrelevant.

July 11. 1826.

2d Division.

Lord Medwyn.

M'K.

Bruce at first declined to lodge answers to this condescendence; but the Lord Ordinary having reported the cause verbally, the Court ordained him to lodge answers, and he having accordingly done so, the record was closed, and the cause reported by the Lord Ordinary. The Court refused to hear argument on the part of the trustee in support of his objections, and remitted to an accountant to report whether there was the legal concurrence of creditors; and on his reporting (but without entering into the objections to the several claims) that there was a concurrence of four-fifths of the creditors who had lodged claims, they granted the discharge, and remitted to the Lord Ordinary to take the bankrupt's oath.

The Court held, that as to creditors who had received a dividend, their votes in a discharge could not be objected to; and as to the others, they seemed to be of opinion, that, after stating his reasons for withholding his concurrence, the trustee was not entitled to go further in opposing the discharge, or, at all events, not without rendering himself liable to be subjected in expenses to the bankrupt. But their Lordships refused a claim on the bankrupt's part for the expenses of the proceedings which had taken place, on the ground that it would be improper to discourage trustees in the execution of their duty, in refusing their consent to the bankrupt's discharge, where they conceived that they had good reasons for so withholding it.

A. DUNCAN,—JAMES BALFOUR, W. S.—Agents.

\* It is proper to make practitioners in general aware, that in consequence of an address by the Faculty of Advocates to the Court, relative to that part of the Act of Sederunt, 12th November 1635, allowing only one counsel to be heard on each side in the Inner House, the following communication was made to the Faculty :—

“ As the Court has no wish in the matter but to conduct business properly, and to do justice to the new form of process, they have no objection to give a fair trial to the proposal of the Faculty, that two counsel shall be heard on each side, under the following restrictions :—

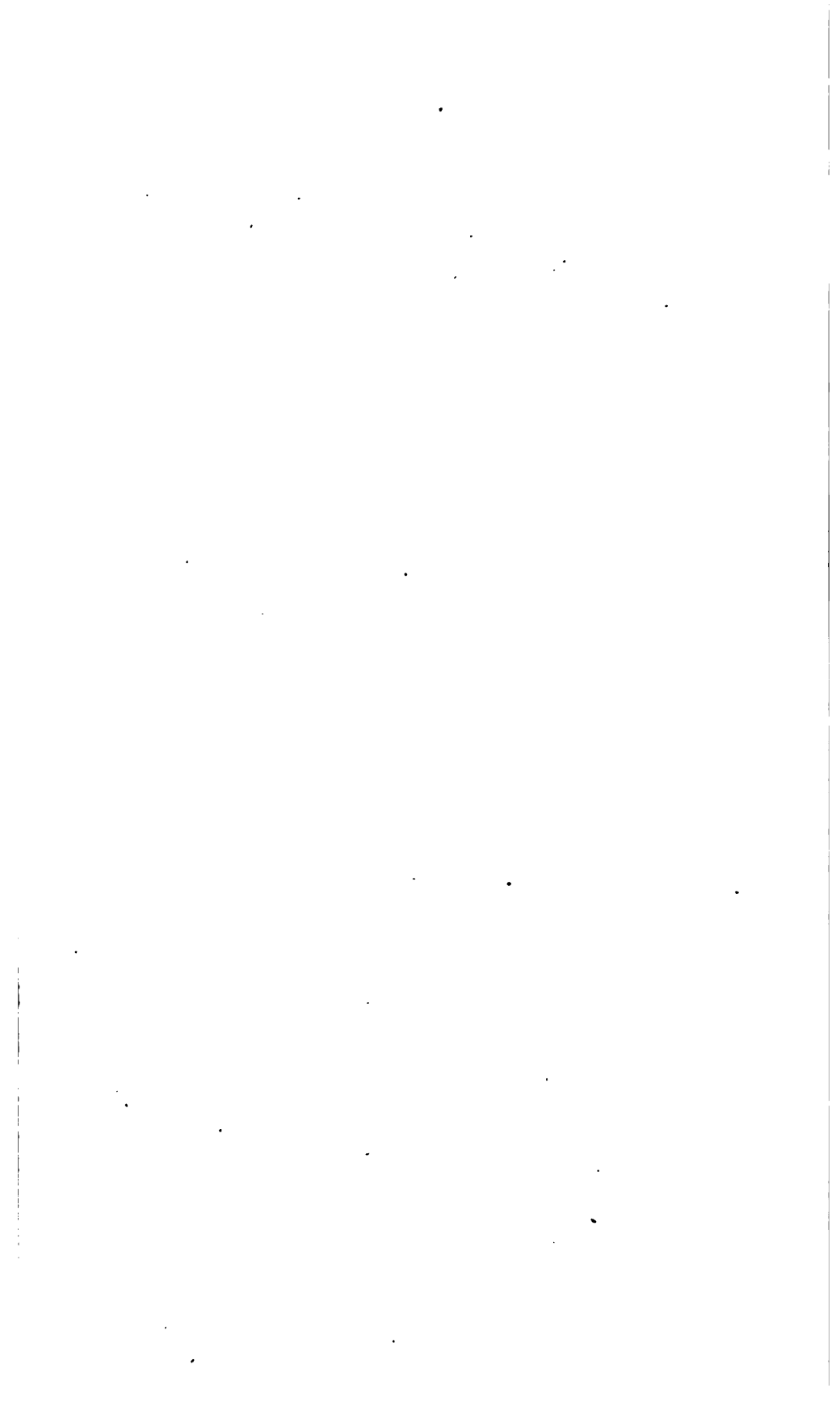
“ *1<sup>mo</sup>*, That it shall be under the discretion of the senior counsel, and on his responsibility, to say, that he considers it to be material to the interest of his client (for that is the real legitimate interest) that four counsel should be heard.

“ *2<sup>do</sup>*, That the junior and opening counsel shall confine themselves strictly to their duty as such, and as was practised of old, confining themselves to such explanation of the facts stated in the condescendence and answers, as to show how they bear on the Pleas of Law, but leaving it entirely to the senior counsel to enlarge on and enforce the Pleas in Law, and quote and apply the authorities.

“ *3<sup>ia</sup>*, That when a cause is called, it shall be proceeded with by such counsel as are in attendance, whether senior or junior; because it is in vain to put off a cause for the absence of one counsel; for when the cause is called again, it is ten to one that another counsel may be otherwise engaged.

“ The President also stated, that in the previous conversation on the subject which the Judges had held among themselves, it was the unanimous opinion of the whole of them, that great fault lay with the Faculty in carrying through the new form of process; that very few condescendences and answers were properly drawn, as mere substantive averments of facts; that the notes of Pleas in Law were often arguments in law; and that very few of the Cases were drawn in terms of the Act of Parliament, but were fully as long and diffuse as the old memorials and informations; by all which means, the Court felt, that while they were obliged to hear longer *viva voce* pleadings in Court, their reading at home remained fully as laborious as ever. The President, therefore, in the name and at the desire of the Court, requested the Dean to impress on the Faculty the absolute necessity of their entering more thoroughly into the spirit of the new form of process, otherwise the Court would be under the necessity of adopting strong measures, directed against counsel and agents transgressing. For, under the Act of Parliament, it is at least very doubtful if the Inner House has any power over the record, as closed by the Ordinary; and secondly, even if they have the power to order a cause to be sent back to the Ordinary to prepare a new record, this is punishing the party, and subjecting him to a heavy expense for the fault of his counsel and agent.

“ The Court therefore expects that the Dean will impress these matters on the Faculty; for there has hardly been one record made up yet, that is fit to be presented to the House of Lords, if the cause go there.”





# APPENDIX.

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## SPECIAL CASES, WINTER SESSION, 1825-6.

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Nov. 18. 1825—First Division—Lord Eldon—H.

GALLOWAY BANKING COMPANY, Pursuers.  
J. NAPIER, Defender.—*Christison*.

L. O. ordered to condescend. Court adhered.

R. Rutherford, W. S.—Walker, Richardson, and Melville, W. S.—  
Agents.

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Nov. 18. 1825—First Division—Lord Meadowbank—D.

Captain T. BROWN, Advocate.—*More*.  
W. FERGUS, &c. Respondents.

Sheriff of Fife granted warrant of roup against Brown. L. O.  
remitted simpliciter. Court refused petition.

G. Combe, W. S.—Forsyth and Macdougall,—Agents.

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Nov. 18. 1825—Second Division—Lord Cringletie—M'K.

J. GORDON, Pursuer.—*A. M'Neill*.  
A. LAWRENCE, Defender.—*Currie*.

L. O. assolizied. Court refused petition.

R. Kennedy, W. S.—C. Gordon,—Agents.

Nov. 22. 1825—First Division—Lord Meadowbank—H.

A. THOMSON.—*Fullerton.*

J. M'NAIR.—*Rutherford.*

Competing.

L. O. decerned against Thomson for expenses. Court altered.

W. Douglas, W. S.—Gibson-Craigs and Wardlaw, W. S.—Agents.

Nov. 22. 1825—Second Division—F.

R. M'KENZIE, W. S.—*Baird.*

W. DRYSDALE, W. S.—*M'Neill.*

Competing.

Warrant in favour of common agent in ranking and sale, for payment of his accounts.

Parties,—Agents.

Nov. 24. 1825—Second Division—Lord Mackenzie—B.

N. KYNOCK and G. BOOTH.—*Jameson.*

M. INGLIS and Others.—*Gordon.*

Competing.

L. O. pronounced decree of preference for certain legacies in favour of Inglis, &c. Court adhered.

C. Gordon,—Joseph Gordon, W. S.—Agents.

Nov. 26. 1825—Second Division—Bill-Chamber—Lord Alloway—M'K.

D. CAMPBELL, Suspender.—*Jameson.*

WILSON and M'INTYRE, Chargers.—*Robertson.*

Bill of suspension of a charge on a bill of exchange, on report of L. O., passed without caution or consignation.

Gibson-Craigs and Wardlaw, W. S.—J. Mackenzie,—Agents.

Nov. 29. 1825—Second Division—Bill-Chamber—Lord Mackenzie—B.

Mrs. ANN YATES, Advocate.—*Christison*.

Mrs. ANN GILMOUR, Respondent.

L. O. refused bill of advocacy from judgment of Sheriff of Dumfries as to expenses. Court adhered.

Ritchie and Miller,—J. Brown,—Agents.

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Nov. 29. 1825—Second Division—Bill-Chamber—Lord Alloway—M'K.

A. GRIERSON, Suspender.—*Graham Bell*.

J. BARBOUR, Charger.

L. O. refused bill of suspension of charge on a bill of exchange. Court adhered.

W. M. Little,—W. Dalrymple,—Agents.

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Nov. 29. 1825—Second Division—Lord Cringletie—B.

J. OGILVIE, Pursuer.—*Christison*.

Mrs. M. BALFOUR and Others, Defenders.—*Jardine*.

L. O. sustained objections to two items in a factor's account. Court remitted to hear on new productions.

Ritchie and Miller,—A. Stevenson,—Agents.

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Nov. 30. 1825—First Division—Lord Meadowbank—H.

W. WIGHTON, Pursuer.—*Greenshields*.

J. KERR, Defender.—*Buchanan*.

L. O. assolizied. Court adhered.

R. Cargill, W. S.—J. Young,—Agents.

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Dec. 1. 1825—First Division—Bill-Chamber—Lord Meadowbank—H.

G. OGILVY, &c. Suspenders.—*Neaves*.

W. SHARP, Charger.—*Jameson*.

L. O. refused bill of suspension. Court adhered.

T. Deuchar,—C. F. Davidson, W. S.—Agents.

## APPENDIX.

Dec. 1. 1825—Second Division—Lord Cringetie—M'K.

EARL OF BREADALBANE, Pursuer and Charger.—*Jardine*.  
M'NAB'S TRUSTEES, Defenders and Suspenders.—*Brown*.

L. O. found M'Nab's trustees liable in expenses. Court altered, awarded expenses to them in the suspension, and to neither party in the ordinary action.

H. Davidson, W. S.—C. M'Donald, W. S.—Agents.

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Dec. 2. 1825—First Division—Lord Meadowbank—H.

J. LANG, Pursuer.—*Greenshields*.  
Mrs. TARBOT, &c. Defenders.—*Walker*.

L. O. remitted to accountant. Court recalled, and ordered condescendence.

R. Rutherford, W. S.—A. Manners, W. S.—Agents.

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Dec. 3. 1825—First Division—Bill-Chamber—Lord Hermand—D.

J. HOME, &c. Suspenders.—*Brownlee*.  
G. MAIN, &c. Chargers.

L. O. refused bill of suspension. Court adhered in part, and passed in part.

T. Megget, W. S.—R. Mackenzie, W. S.—Agents.

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Dec. 3. 1825—First Division—Lord Meadowbank—S.

J. GREIG, Pursuer.—*Dundas*.  
A. MACALLISTER, &c. Defenders.—*Jameson*.

L. O. sisted procedure. Court altered, and remitted to conjoin actions, and proceed.

Greig and Peddie, W. S.—Campbell and Macdowall,—Agents.

Dec. 3. 1825—Second Division—Bill Chamber—Lord Medwyn—F.

J. MORRISON, Suspender.—*Whigham*.

J. RUTHVEN, Charger.—*Rutherford*.

L. O. refused interdict against alleged invasion of patent, while he passed bill of suspension. Court adhered.

Murray and Inglis, W. S.—Gibson and Oliphant, W. S.—Agents.

Dec. 9. 1825—First Division—Lord Meadowbank—H.

A. WISE, Pursuer.—*M'Leod*.

Miss RALSTON, Defender.—*Matheson*.

L. O. assolizied. Court adhered.

W. Mercer, W. S.—J. Kennedy, W. S.—Agents.

Dec. 10. 1825—First Division—Lord Eldin—S.

Mrs. BURNS, Pursuer.—*Ivory*.

J. BURNS, Defender.—*J. W. Dickson*.

L. O. found expenses due to neither party. Court altered, and awarded to pursuer.

Anderson and Whitehead, W. S.—J. C. Wilson, W. S.—Agents.

Dec. 13. 1825—First Division—Lord Eldin—H.

J. STENHOUSE, Pursuer.—*Cay*.

J. LOCKIE, Defender.—*J. Henderson jun.*

L. O. assolizied. Court adhered.

J. Johnston,—Gibson-Craigs and Wardlaw, W. S.—Agents.

Dec. 14. 1825—First Division—Lord Meadowbank—H.

J. HALKERSTON, Pursuer and Respondent.—*L' Amy*:

A. GREIG, &c. Defenders and Advocators.—*M'Neill*.

Decree by Sheriff of Fife. L. O. altered, and assolizied. Court adhered.

G. Gordon,—J. Young, W. S.—Agents.

Dec. 14. 1825—Second Division—Lord Mackenzie—M'K.

J. SHEARER and Others, Pursuers.—*Robertson*.

J. URE and Others, Defenders.—*J. Henderson jun.*

L. O. repelled defences. Court adhered in part, and remitted *quoad ultra*.

J. R. Stodart, W. S.—D. Cleghorn, W. S.—Agents.

Dec. 15. 1825—First Division—Bill-Chamber—Lord Meadowbank—H.

G. MELVILLE, Suspender.—*Marshall*.

F. MELVILLE, Charger.—*Forsyth*.

L. O. refused bill of suspension. Court passed.

Macmillan and Grant, W. S.—D. Fisher,—Agents.

Dec. 15. 1825—Second Division—Lord Cringletie—M'K.

J. SCBULLER and J. BROWNLEE, Advocators.—*Monteith*.

J. ROBERTSON, Respondent.—*Jameson*.

L. O. altered judgment of Magistrates of Glasgow. Court recalled; but remitted to alter in part, and hear further *quoad ultra*.

A. P. Henderson,—J. Smyth, W. S.—Agents.

Dec. 17. 1825—First Division—Lord Meadowbank—H.

L. HILL, Pursuer.

C. CAMPBELL, Defender.—*Maidment*.

L. O. granted decree of certification. Court recalled.

J. G. Hopkirk, W. S.—T. Graham, W. S.—Agents.

Dec. 22. 1825—First Division—Lord Meadowbank—H.

A. FERRIE, Pursuer.—*Shaw*.

RENFREWSHIRE BANKING COMPANY, Defenders.—*Rutherford*.

L. O. assoilzied, but no expenses. Court adhered.

W. Drysdale, W. S.—A. Pearson, W. S.—Agents.

## APPENDIX.

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Jan. 20. 1826—Second Division—Lord Cringletie—M<sup>r</sup>K.

A. MURRAY, Pursuer.—*Maitland*.  
LITTLE and CROCKET, Defenders.—*Whigham*.

Interim decree by L. O. Court adhered.

W. Martin,—R. Rutherford, W. S.—Agents.

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Jan. 24. 1826—Second Division—Lord Cringletie—B.

J. CLAY and Others, Advocators.—*Baird*.  
J. TAIT, W. S. Respondent.—*More*.

L. O. awarded expenses to Clay, &c. Court found them due to neither party.

Ainslie and M<sup>r</sup>Allan, W. S.—Party,—Agents.

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Jan. 26. 1826—First Division—Lord Eldin—H.

P. LORIMER, Pursuer.—*A. Anderson*.  
D. SCOTT, Defender.—*Robertson*.

L. O. assolizied. Court adhered.

Cunningham and Bell, W. S.—Scott and Boog, W. S.—Agents.

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Jan. 26. 1826—Second Division—Lord Cringletie—B.

J. HALDEN, Advocate.—*Forsyth*.  
G. BOSS, &c. Respondents.

Decree by Sheriff of Lanark. L. O. advocated and assolizied. Court adhered.

J. Grainger, W. S.—A. Storie, W. S.—Agents.

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Jan. 28. 1826—First Division—Bill Chamber—Lord Eldin—S.

W. C. WALKER, Suspender.—*Wilson*.  
Sir R. PRESTON, Charger.—*Maconochie*.

L. O. passed bill of suspension. Court adhered.

J. Johnston jun.—J. Thomson, W. S.—Agents.

Jan. 28. 1826—Second Division—Bill-Chamber—Lord Cringletie—F.

Major J. M'DONELL, Suspender.—*A. Wood.*

R. DONALDSON, Charger.—*Carlyle.*

L. O. passed bill of suspension of charge on bill of exchange.  
Court adhered.

James M'Donell, W. S.—Gibson and Oliphant, W. S.—Agents.

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Jan. 28. 1826—Second Division—Bill-Chamber—Lord Robertson—F.

J. and D. M'DONALD, Suspenders.—*W. Bell.*

J. M'TAVISH, Charger.—*A. Wood.*

L. O. passed bill of suspension of a charge against attestors in  
a bond of caution, on ground of cautioner's name being forged.  
Court adhered.

J. Hunter, W. S.—J. M'Donell, W. S.—Agents.

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Feb. 1. 1826—First Division—Lord Medwyn—D.

A. MACKENZIE, Pursuer.—*Hunter.*

K. MACKENZIE, Defender.—*Cuninghame.*

L. O. assoilzied. Court adhered.

R. Mackenzie, W. S.—R. Roy, W. S.—Agents.

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Feb. 1. 1826—First Division—H.

J. HOWE, Petitioner.—*Graham Bell.*

W. M'NAUGHT, Respondent.—*Gillies.*

Petition for factor dismissed.

Mack and Wotherspoon, W. S.—J. Thorburn,—Agents.

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Feb. 3. 1826—First Division—D.

J. M'MASTER, Pursuer.—*Pyper.*

His CREDITORS, Defenders.—*Marshall.*

Decree of cessio refused.

R. Welsh,—J. Wemyss, W. S.—Agents.



Feb. 4. 1826—First Division—Lord Eldin—D.

W. GULLEN, &c. Pursuers and Respondents.—*J. W. Dickson.*

J. MURRAY, &c. Defenders and Advocators.—*R. Whigham.*

L. O. found previous expenses due by pursuers. Court adhered.

R. Jameson, W. S.—Murray and Inglis, W. S.—Agents.

Feb. 4. 1826—Second Division—Bill-Chamber—Lord Eldin—B.

J. BURGESS, Advocate.—*J. Henderson jun.*

BUCK and COMPANY, Respondents.—*Shaw.*

Decree by Magistrates of Aberdeen. L. O., on a bill of advocacy, remitted to assaillzie. Court altered, and passed bill.

C. F. Davidson, W. S.—C. Gordon,—Agents.

Feb. 4. 1826—Second Division—Bill-Chamber—Lord Medwyn—M'K.

F. GORDON, Suspender.—*Gordon.*

DOUGLAS'S TRUSTEES, Chargers.—*Clephane.*

L. O. refused bill of suspension. Court altered, and remitted to pass.

J. Gordon, W. S.—Thomson and Ferguson, W. S.—Agents.

Feb. 7. 1826—First Division—Lord Eldin—H.

H. ELRICK, Pursuer and Advocate.—*Napier.*

S. LAING, Defender and Respondent.—*H. J. Robertson.*

Sheriff of Orkney decerned. L. O. remitted to assaillzie. Court passed bill of advocacy.

J. and C. Nairne, W. S.—W. and G. Napier, W. S.—Agents.

Feb. 7. 1826—Second Division—Lord Robertson—M'K.

J. GILCHRIST, Pursuer.—*Baird.*

A. GRANT and Others, Defenders.—*A. Wood.*

L. O. decerned. Court altered and assaillzied.

F. Fraser,—James Grant, W. S.—Agents.

Feb. 7. 1826—Second Division—F.

J. M'LEOD, Pursuer.—*Buchanan*.  
His CREDITORS, Defenders.—*W. Bell*.

Benefit of cessio granted, with expenses of proof, in which the creditors failed to establish their averments.

H. M'Queen, W. S.—D. M'Lean, W. S.—Agents.

Feb. 10. 1826—First Division—Bill Chamber—H.

W. LANDERS, Pursuer and Advocator.—*Brownlee*.  
R. BRUCE, Defender and Respondent.—*H. Bruce*.

Decree by Sheriff of Clackmannan to certain extent. L. O. remitted simpliciter. Court adhered.

G. Steedman,—Ker and Dickson, W. S.—Agents.

Feb. 10. 1826—First Division—Lord Meadowbank—D.

J. MURRAY, Pursuer and Respondent.—*Tytler*.  
Mrs. TAYLOR, Defender and Advocator.—*Dundas*.

Sheriff of Edinburgh decerned. L. O. remitted simpliciter. Court adhered.

Hotchkiss and Meiklejohn, W. S.—J. Taylor,—Agents.

Feb. 11. 1826—First Division—Lord Medwyn—H.

J. CLEGHORN, W. S. Pursuer.  
W. RIDDEL, &c. Defenders.

L. O. assoilzied; but no expenses. Court adhered.

J. Dundas, W. S.—J. Watson,—H. Davidson, W. S.—Agents.

Feb. 15. 1826—First Division—Bill Chamber—Lord Eldin—H.

R. RUSSEL, Pursuer and Advocator.—*Green Shields*.  
EWING, MAY, and Co. Defenders and Respondents.—*Jamieson*.

Sheriff of Lanarkshire assoilzied. L. O. ordered condescendence. Court altered, and assoilzied.

R. Welsh,—T. Darling,—Agents.

Feb. 15. 1826—Second Division—Lord Mackenzie—F.

C. GREENHILL, Pursuer.—*Neaves*.

Mrs. C. AITKEN, Defender.—*Greenshields*.

L. O. refused to order immediate production of accounts, &c., in an action of exhibition and count and reckoning. Court, hoc statu, adhered.

T. Deuchar,—R. Rattray, W. S.—Agents.

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Feb. 16. 1826—Second Division—Lord Mackenzie—B.

W. EWING, Pursuer.—*Miller*.

T. LAWSON, Defender.—*Meldrum*.

L. O. assolizied. Court adhered.

Campbell and Mack, W. S.—C. F. Davidson, W. S.—Agents..

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Feb. 17. 1826—Second Division—Bill Chamber—Lord Medwyn—F.

W. PETER, Suspender.—*Russell*.

H. GORDON, Charger.—*Hopkirk*.

Sheriff of Dumbartonshire decerned against Peter. L. O. refused bill of suspension. Court, in respect of statements made at the Bar, altered, and remitted to pass.

J. Crawford, W. S.—J. G. Hopkirk, W. S.—Agents.

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Feb. 21. 1826—First Division—Lord Eldon—S.

J. LOWE, Pursuer.—*Robertson*.

J. RAFFIN, Defender.—*Currie*.

L. O. assolizied. Court adhered.

J. R. Stodart, W. S.—T. Grierson, W. S.—Agents.

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Feb. 21. 1826—Second Division—Lord Cringletie—B.

Rev. L. BUTTER, Advocate.—*Shaw*.

Mrs. C. B. OLIPHANT, Respondent.—*A. Wood*.

Sheriff of Perthshire decerned. L. O. remitted simpliciter. Court adhered.

N. W. Robertson,—Fotheringham and Lindsay, W. S.—Agents.

Feb. 21. 1826—Second Division—Lord Mackenzie—F.

J. WORDSWORTH, Pursuer.—*L' Amy*.  
 Mrs. MARY GLEED, Defender.—*Hoxier*.

L. O. sustained a plea of compensation and retention. Court adhered.

J. Jones,—J. Bruce jun. W. S.—Agents.

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Feb. 23. 1826—First Division—Lord Eldin—S.

J. RUTHERFORD, &c. Pursuers.—*Pringle*.  
 R. HENDERSON, Defender.—*Rutherford*.

L. O. assoilzied. Court adhered.

W. Lang, W. S.—J. Young,—Agents.

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Feb. 24. 1826—Second Division—Lord Ormrod—F.

ALLASON'S TRUSTEES.—*Baird*.  
 J. M'CUBBIN.—*Ballantine*.

Competing.

Special interlocutor.

Hunter, Campbell, and Cathcart, W. S.—W. Ballantine, W. S.—  
 Agents.

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Feb. 25. 1826—First Division—Lord Eldin—D.

J. STEEL, Pursuer.  
 A. HAMILTON, Defender.—*A. McNeill*.

L. O. repelled defence. Court adhered.

J. Malcolm,—J. Johnston,—Agents.

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Feb. 25. 1826—First Division—Lord Eldin—H.

Mrs. COLVIN, &c. Pursuers.  
 P. CHRISTIAN, Defender.—*Buchanan*.

L. O. decerned. Court adhered.

G. Tod,—G. Hogarth, W. S.—Agents.

Feb. 25. 1826—Second Division—Bill Chamber—B.

J. JONES, Suspendor.—*Cuninghame*.

J. GLASSFORD and H. GORDON, Chargers.—*Hopkirk*.

Sheriff of Stirlingshire granted warrant of sale by roup. L. O. refused bill of suspension. Court altered and passed.

T. Megget, W. S.—J. G. Hopkirk, W. S.—Agents.

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Feb. 25, 1826—Second Division—Lord Cringletie—M'K.

R. ANDERSON, Pursuer.—*Shaw*.

Hon. Mrs. STEWART M'KENZIE and HUSBAND, Defenders.—*Rutherford*.

Decree of consent.

Gibson-Craigs and Wardlaw, W. S.—R. Aytoun, W. S.—Agents.

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March 1. 1826—First Division—Lord Eldon—S.

G. SAUNDERS, Pursuer.—*Clephane*.

J. MARSHALL, &c. Defenders.—*Cuninghame*.

L. O. found pursuer liable in expenses. Court recalled.

W. Guthrie,—J. Duncan, W. S.—J. Baird,—Agents.

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March 4. 1826—First Division—Lord Meadowbank—H.

A. MUIR, &c. Pursuers and Respondents.—*Cullen*.

D. MUNRO, Defender and Advocate.

Judge-Admiral decerned. L. O. ordered condescendence. Court remitted to hear as to previous expenses.

Ormiston and Allan,—D. Clyne,—Agents.

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March 4. 1826—First Division—Lord Meadowbank—D.

J. VOSPER, Pursuer.—*T. H. Miller*.

Captain LOGAN, Defender.—*M' Allan*.

L. O. found expenses due to neither party. Court adhered.

J. Liddle,—G. Logan, W. S.—Agents.

March 4. 1836—Second Division—Lord Medwyn—F.

A. BROWN, Pursuer.

Mrs. C. BROWN and Others, Defenders.—*D. Macfarlane.*

L. O. found that the defenders must pay the pursuer's expenses, before being heard on a new plea. Court recalled, reserving all questions of expenses.

W. Waddel, W. S.—J. Smyth, W. S.—Agents.

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March 4. 1836—Second Division—Bill Chamber—Lord Medwyn—M'K.

T. STEPHENS, Suspender.—*Cadell.*

Mrs. WAUCHOP and Others, Chargers.—*Anderson.*

L. O. refused bill of suspension. Court adhered.

J. Cunningham, W. S.—W. M'Kenzie, W. S.—Agents.

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March 8. 1836—First Division—Lord Medwyn—S.

Hon. J. SINCLAIR, Complainer.—*Sol.-Gen. Hope.*

W. INNES, Respondent.—*Matheson.*

Court, on report of L. O., sustained complaint.

A. Monypenny, W. S.—J. Gordon, W. S.—Agents.

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March 9. 1836—Second Division—M'K.

W. C. C. GRAHAM, Petitioner.—*Spicers.*

C. FERRIER, Respondent.—*Forsyth.*

Inhibition recalled on caution.

W. Cook, W. S.—J. Swan, W. S.—Agents.

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March 9. 1836—Second Division—M'K.

R. M'LUKE, Petitioner.

Mrs. G. M'NEILL, Respondent.—*W. Bell.*

Inhibition recalled.

J. Dunlop, W. S.—Craystoun and Anderson, W. S.—Agents.

March 11. 1836—Second Division—Bill Chamber—Lord Mackenzie—M.K.

A. HERBERTSON, Suspender.—*Shaw.*

J. CRUM and COMPANY, Chargers.—*Rutherford.*

L. O. passed, on caution, a bill of suspension of charge on a bill of exchange, on ground of forgery. Court passed without caution.

Campbell and Burnside, W. S.—Gibson-Craigs and Wardlaw, W. S.—  
Agents.

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## APPENDIX.

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### SPECIAL CASES, SUMMER SESSION, 1826.

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May 13. 1826—First Division—Lord Eldin—H.

J. M'GOWAN, Pursuer.—  
D. M'KELLAR, Defender.—*Pyper*.

L. O. assolizied. Court altered, and returned in terms of the conclusion of libel; and thereafter refused a reference to pursuer's oath, as incompetent.

M. Patison,—Macmillan and Grant, W. S.—Agents.

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May 16. 1826—First Division—Lord Eldin—H.

M. NICOLSON, Pursuer.—*W. Bell*.  
Mrs. F. NICOLSON and HUSBAND, Defenders.—*Handyside*.

L. O. ordered pursuer to give in a condescendence of the amount of meliorations claimed by him. Court adhered.

A. Gray, W. S.—C. Macalister, W. S.—Agents.

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May 17. 1826—First Division—Lord Alloway—D.

FAULKNER and THOMSON, Pursuers.—*J. Hamilton*.  
A. HUTCHISON'S TRUST DISPONEES, and J. MASON, Defenders.  
—*Cuninghame*.

L. O. assolizied Mason; quoad ultra, remitted action to a process of count and reckoning. Court, after obtaining report of accountant, adhered.

J. Jollie, W. S.—J. A. Cheyne, W. S.—Agents.

## APPENDIX.

June 1. 1826—First Division—Lord Eldin—H.

J. DICKSON, Pursuer.—*Maidment.*

A. DICKSON, Defender.—*Johnson.*

L. O. assolized in part. Court adhered.

J. J. FRASER, W. S.—A. GREIG, W. S.—Agents.

June 1. 1826—Second Division—Lord Mackenzie—M'K.

J. B. FRASER, Suspender.—*Menzies.*

J. LAING, Charger.—*Matheson.*

L. O. found letters orderly proceeded. Court altered, and suspended.

Party,—G. Veitch, W. S.—Agents.

June 2. 1826—First Division—Lord Medwyn—H.

D. LANG, Suspender.—*Pyper.*

J. ALEXANDER, Charger.—*Macfarlane.*

Court, on report of L. O., passed bill.

J. Lang, W. S.—Tod and Wright, W. S.—Agents.

June 3. 1826—First Division—S.

W. STARK, Pursuer.—*Cheape.*

His CREDITORS, Defenders.—*Marshall.*

Court refused cessio.

J. B. GRACIE, W. S.—D. and A. THOMPSON, W. S.—Agents.

June 3. 1826—First Division—Lord Eldin—D.

S. ROBERTSON, W. S.

Col. GORDON, Defender.—*Stene.*

L. O. special interlocutor. Court recalled.

J. J. FRASER, W. S.—J. S. ROBERTSON, W. S.—Agents.

## APPENDIX.

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June 2. 1826.—First Division—D.

Mrs. M'HARG, Pursuer.

M'ALLEN and HANSON, Defendants.—*Morr.*

Court decreed for £500 arrears.

Hunter, Campbell, and Cathcart, W. S.—M. N. M'Donald, W. S.—  
Agents.

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June 3. 1826.—First Division—S.

J. LYON.—*Wood.*

M'KENZIE'S TRUSTEES.

Competing.

L. O. preferred M'Kenzie's trustees. Court, of consent, adhered.

H. Cowan, W. S.—E. Roy, W. S.—J. Anderson, W. S.—Agents.

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June 9. 1826.—First Division—Lord Eldin—S.

J. MELVIN, Advocate.—*Greensfield.*

R. WADDEL, Respondent.—*Brown.*

L. O. remitted simpliciter. Court adhered.

J. Johnston, —J. Crawford, W. S.—Agents.

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June 10. 1826.—Second Division—Lord Cringlittie—F.

POLLOCK and DICKSON, Advocates.

W. MACANDREW, Respondent.

L. O. dismissed advocacy, in respect it did not recite the special defences in the Inferior Court process. The Court, under the peculiar circumstances of the case, recalled, and remitted to proceed.

J. Hamilton, W. S.—Bowie and Campbell, W. S.—Agents.

## APPENDIX:

June 14. 1826—First Division—Lord Eldon—H.

Mrs. LOGAN, Pursuer.—*Wright*.  
G. THOM and Others, Defenders.—*Mors*.

L. O. decerned in part. Court adhered in part, and remitted in part.

Cunningham and Bell, W. S.—W. and A. G. Ellis, W. S.—Agents.

June 16. 1826—First Division—Lord Eldon—D.

W. GLENNIE, Pursuer.—*Whigham*.  
A. M'PHAIL, Defender.—*Boswell*.

L. O. decerned. Court adhered.

D. Clyne,—J. Ferguson, W. S.—Agents.

June 17. 1826—First Division—Lord Meadowbank—H.

A. MUIR and Co. Pursuers.—*Cullen*.  
D. MUNRO, Defender.

L. O. refused previous expenses. Court altered, and awarded them.

Ormiston and Allan,—D. Clyne,—Agents.

June 20. 1826—First Division—Lord Eldon—S.

J. PATERSON, Pursuer.—*Shaw*.  
A. M'KENZIE, Defender.—*H. J. Robertson*.

L. O. repelled defences in part. Court altered, and assoilzied.

M'Kenzie and Innes, W. S.—H. Gordon, W. S.—Agents.

June 20. 1826—Second Division—Bill-Chamber—Lord Robertson—M'K.

G. ANDERSON, Suspender.—*Sandford*.  
J. LOWSON, Charger.—*Neaves*.

L. O. refused a bill of suspension of a judgment of the Sheriff. Court remitted to pass.

A. Connell, W. S.—Ramsay and Innis, W. S.—Agents.

## APPENDIX.

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June 20. 1826—Second Division—Bill-Chamber—Lord Alloway—B.

R. JACKSON, Suspender.—*Christison*.

Mrs. E. JACKSON and Another, Chargers.—*Ivory*.

L. O. passed bill of suspension on caution. Court passed on juratory caution.

Ritchie and Miller,—W. Murray, W. S.—Agents.

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June 20. 1826—Second Division—Lord Mackenzie—B.

STUARTS and FLETCHER, Pursuers.

R. M'GRIGOR and COMPANY, Defenders.—*Ivory*.

Concerted interlocutor.

Campbell and Macdowall,—W. Renny, W. S.—Agents.

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June 22. 1826—Second Division—Lord Mackenzie—F.

J. THOMSON, Raiser of Multiplepoinding.—*Whigham*.

J. LOWRIE, Claimant.—*D. Dickson*.

L. O. found nominal raiser of a multiplepoinding had no funds in his hands. Court recalled, and remitted to hear parties on a demand for a diligence.

J. Liddle,—Agent.

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June 23. 1826—First Division—D.

J. M'MASTER, Petitioner.—*Monteith*.

W. CORRIE, &c. Respondents.—*Currie*.

Court refused petition, but appointed a third party factor loco tutoris, of consent.

J. Pattison, W. S.—R. Welsh,—Agents.

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June 24. 1826—Second Division—Lord Mackenzie—B.

STEIN'S ASSIGNEES, Pursuers.—*Sandford*.

TAYLOR'S REPRESENTATIVES, Defenders.—*Cuninghame*.

Remit to L. O.

D. Fisher,—Greig and Peddie, W. S.—Agents.

## APPENDIX.

June 25. 1826—First Division—Lord Medwyn—D.

A. CORRIE, Suspender.—*W. Marshall*

J. BARBOUR, Charger.—*Marshall*

L. O. suspended. Court, of consent, adhered.

R. Welsh,—W. Dalrymple,—Agents.

June 27. 1826—Second Division—Bill Chamber—Lord Craigie—B.

D. MORISON, Suspender.—*Stewart*

R. MORISON, Charger.—*M. Hall*

L. O. refused bill of suspension. Court adhered, reserving to suspender to make reference to charger's oath.

J. Arnott, W. S.—L. Mackintosh,—Agents.

June 27. 1826—Second Division—Bill Chamber—Lord Medwyn—M.K.

R. DUFF and Others, Suspenders.—*Jameson*

MAGISTRATES OF PERTH, Chargers.

L. O. refused bill of suspension of a charge for payment of rent. Court remitted to pass.

Murray and Inglis, W.S.—W. Murray, W. S.—Agents.

June 27. 1826—Second Division—Bill Chamber—Lord Medwyn—M.K.

R. LOCKHART, Advocate.—*Currie*

R. THOMAS, Respondent.—*Sandford*

L. O. remitted with instructions to recal an interlocutor, on payment of certain previous expenses. Court adhered.

W. Ferguson, W. S.—Agent.

APPENDIX.

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June 28. 1826—First Division—Lord Meadowbank—S.

D. CHALMERS, Suspender.—*Gillies*.

J. BISHOP, Charger.—*Tytler*.

L. O. suspended in respect of oath, but found no expenses.  
Court altered, and awarded expenses.

T. Small, W. S.—Hotchkis and Meiklejohn, W. S.—Agents.

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June 28. 1826—Second Division—Lord Medwyn—B.

D. NICHOLSON, Pursuer.—*J. W. Dickson*.

J. WIN, Defender.—*A. McNeill*.

L. O. assailed. Court adhered.

D. Clyne,—H. Tod, W. S.—Agents.

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June 28. 1826—Second Division—Lord Cringletie—F.

J. TELFER and COMPANY, Pursuers.—*Clephane*.

C. CONNELL, Defender.—*Green Shields*.

L. O. pronounced a judgment on an oath emitted on reference.  
Court recalled, and remitted to have a re-examination.

W. Guthrie,—J. Gemmel,—Agents.

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June 28. 1826—Second Division—Lord Medwyn—B.

J. M'GAVIN, Pursuer.—*More*.

D. MATHIE, Defender.—*G. Napier*.

Remit to the Jury Court to try disputed matters of fact.

W. and A. G. Ellis, W. S.—G. and W. Napier, W. S.—Agents.

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June 29. 1826—First Division—Lord Eldon—H.

J. and F. LAWSON, Suspenders.—*Moncreiff*.

P. MURRAY, Charger.—*Smythe*.

L. O. sustained reference to oath. Court altered, without prejudice to a more correct reference.

Macmillan and Grant, W. S.—J. Dundas, W. S.—Agents.

## APPENDIX.

June 22, 1896—Second Division—F.

J. DUNWARD, Petitioner.—*Brownlee*.

Petition for warrant to deliver up bond of caution refused.

A. Johnston, W. S.—Agent.

June 30, 1896—First Division—Lord Eldon—D.

Miss SMITH, Advocate.—*Haird*.

Mrs. MERCER, Respondent.—*A. McNeill*.

L. O. remitted to accountant to refuse certain books as evidence. Court ~~adhered~~ *ordered Cases*

Hunter, Campbell, and Cathcart, W. S.—D. Brown, W. S.—Agents.

July 1, 1896—Second Division—Lord Medwyn—F.

A. FOREMAN, Pursuer.—*McFarlan*.

Mrs. E. BOYACK or FOREMAN, Defender.—*Skene*.

Remit to L. O. to ascertain a certain fact.

Tod and Wright, W. S.—P. Pearson,—Agents.

July 4, 1896—Second Division—Lord Robertson—M'K.

R. HENDERSON.—*Henderson*.

D. of ATHOLL.—*Jameson*.

Competing.

L. O. preferred the Duke of Atholl to the fund in medio in a multiplepounding. Court adhered, without prejudice to any competent reference to oath.

J. Young,—H. Graham,—Agents.



## APPENDIX.

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July 7. 1826—Second Division—M'K.

W. WILSON, Pursuer.—*Ivory*.  
His CREDITORS, Defenders.—*More*.

Benefit of cessio refused hoc statu.

Gibson-Craigs and Wardlaw, W. S.—G. Combe, W. S.—Agents.

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D. FISHER and SPOUSE, Claimants.—*Forsyth*.

L. O. ordained raisers to consign fund in medio. Court adhered.

Tod and Romanes, W. S.—A. Forsyth,—Agents.

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G. GALLOWAY, Suspender.—*Maitland Makgill*.  
G. SELKIRK Jun. Charger.—*Skene*.

L. O. passed bill of suspension on caution. Court passed it on juratory caution.

R. Thomson,—Agent.

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July 11. 1826—Second Division—B.

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## E R R A T A.

- P. 54. l. 4. for *he* read *she*.  
P. 73. l. 3. title, No. 61. for *c*, 21. read *c*. 61.  
P. 83. l. 8. from foot, for *omissionis* read *amissionis*.  
P. 116. l. 27. for *assignee* read *assigner*.  
P. 119. l. 2. for *December* read *February*.  
P. 156. l. 7. from foot, for *Lead* read *Love*.  
P. 172. l. 2. for *he* read *she*.  
P. 208. l. 4. of case, No. 170. for 1824 read 1821.  
P. 225. l. 4. from foot, for *of rent* read *of the rent*.  
P. 227. l. 3. of title, No. 181. for *preceding* read *succeeding*.  
P. 287. l. 16. for *his* read *the heirs*.  
P. 354. l. 6. for *allege* read *alleged*.  
P. 357. title, delete *defender*.  
P. 388. l. 3. of title, for *to* read *by*.  
P. 411. l. 14. from foot, for *suspension and liberation* read *advocation*.  
P. 435. l. 5. from foot, for *he* read *and*.  
P. 442. l. 1. of title, No. 294. delete *it was held that*.  
P. 540. l. 12. from foot, for *verbal* read *vertical*.  
P. 669. for the first passage in the note read as follows :—‘The Lord Ordinary ob-  
‘served in a note, ‘That, in the abstract, the Court will hold that a man who  
“has been once liberated from jail under the Act of Grace cannot be again  
“imprisoned on the same caption, *the Lord Ordinary cannot believe, as he*  
“cannot conceive,” &c.  
P. 683. l. 3. of the case, for *they* read *was*.  
P. 707. l. 1. and 5. of No. 429, for *Cott* read *Colt*.  
P. 719. l. 1. of title, No. 435. for *owner* read *owners*.  
P. 719. l. 4. of No. 435. for *into* read *in*.

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  14. Held that a party who has authorized an agent in the Inferior Court to raise an action there, is not liable to an agent in the Court of Session for the expenses of an advocacy, unless he has given a mandate authorizing the advocacy, or has taken benefit from it, or been personally aware of a remit to the Inferior Court, even although his own agent follow forth proceedings under the remit from the Dean of Guild Court there, No. 476. p. 786. See *Attorney's License*, 1. 2.—*Bill of Exchange*, 7.—*Husband and Wife*, 2. 5.—*Hypothes*, (*Writer's*)—*Mandate*—*Prescription*, II. 4.—*Sequestration*, 14.—*Reparation*, 6.

## ALIMENT.

1. Circumstances in which a party allowed an aliment out of his property conveyed to trustees for behoof of his wife and children, No. 155. p. 158.
2. The Court dismissed, as incompetent before this Court, an action of aliment at the instance of a wife against her husband, but awarded an interim sum to preserve her from starvation, No. 410. p. 670.
3. Held, (1.) That an obligation on the part of a son to aliment his mother is not implemented by an offer to receive her into his house, unless the son be unable to afford a separate maintenance; and, (2.) That aliment is due from the date of a summons in the Sheriff Court, although held incompetent so far as regarded a permanent aliment, No. 160. p. 186. See *Bastard*, 2. 4. 6.

ALIMENTARY FUND.—See *Arrestment*, 4.

AMENDMENT OF LIBEL.—See *Freehold Qualification*, 3.—*Process*, V. 6.

APPEAL.—See *Process*, I. 1. 9. III. 5.

## APPEAL, EXECUTION PENDING.

1. Circumstances in which execution pending appeal for payment of expenses was awarded, although the summons concluded only for retention of them out of certain rents, No. 120. p. 143.
2. A party craving execution pending appeal quoad expenses, not entitled to demand interest on them, and only allowed the expense of extract, in the event of their not being paid within a certain short period, No. 153. p. 179.
3. A party having paid expenses, pending appeal, to the opposite agents, without requiring a bond of caution to repeat, the Court, on a reversal, granted warrant for repetition, on a summary application to that effect, No. 155. p. 180.
4. Warrant granted for consignation in a bank of a sum decreed for pending appeal, on caution by the party who was on the poor's roll, for the difference between bank and legal interest in the event of a reversal, No. 346. p. 531. See *Process*, I. 17. VI. 1.

APPLICATION TO APPLY JUDGMENT OF HOUSE OF LORDS.—See *Process*, I. 2.—*Expenses*, 1.

APPRENTICE.—See *Personal Objection*, 4.—*Penalty*, 1.

ARBITER.—See *Submission*.

## ARRESTMENT.

1. Held, (1.) That a warrant from the Magistrates of Glasgow, with concurrence of the Water Bailie, is sufficient to arrest a vessel on the Clyde, and within their jurisdiction. (2.) That it is competent to receive an amended execution of arrestment, which is not inconsistent with the fact, there being no competition; and, (3.) That an arrestment on a dependence covers the expenses of process, although decree be taken in name of the agent, No. 62. p. 76.
2. (1.) Execution of loosing arrestments, under a general will in letters obtained for the purpose of loosing prior arrestments in the hands of another party, held sufficient warrant to authorize the arrestees to pay to the common debtor. (2.) Prescription of arrestment on a dependence runs from the date of the decree, and not of a judgment finding letters orderly proceeded in a subsequent suspension, No. 311. p. 477.

## ARRESTMENT.

3. Arrestments having been executed by a Sheriff-officer in the hands of Sir J. H. M. of Springkell, by leaving a copy with a servant, 'within his dwelling-house,' but without stating at Springkell, and this being his only house within the county, held not a good objection to their validity, that the executions did not specify the name of the dwelling-house, No. 200. p. 261.
4. An annuity, payable to a married woman, whose husband had renounced his *ius mariti*, and which, by her own act and that of a former husband, had been declared purely alimentary, having been arrested on the dependence of an action for payment of bills signed by her, while under coverture, along with her husband, refused to be loosed without caution, except to a partial extent necessary for her subsistence, No. 489. p. 809.
5. Held, that after an arrestment in the hands of a trust-assignee, he was not entitled to make advances to, or on account of the trustor, No. 485. p. 804. See *Inhibition*, 3.

ASSIGNATION.—Circumstances under which an assignation of a lease by a father to a son of 16 years of age was found effectual in a question with the creditors of the father, No. 39. p. 48. See *Arrestment*, 5.—*Debtor and Creditor*, 1.—*Landlord and Tenant*, 2. 12.

## ATTORNEY'S LICENSE.

1. Held that an agent, who had failed to take out his attorney's license during the dependence of an action in which he obtained decree for expenses in his own name, was not entitled to recover them from the party against whom the decree was pronounced, No. 466. p. 772.
2. An omission to take out an attorney's certificate cured under the statute 7. Geo. IV. c. 44; and held that an agent is entitled to charge under a decree obtained in his name for expenses in part incurred to his partner, before the agent was taken into partnership, and while he had no certificate,—the partner having had a certificate for that period, No. 492. p. 813.

BANK NOTES.—See *Pounding*.

## BANKRUPT.

1. Held, (but remitted by the House of Lords for further consideration,) That a payment in cash by a bankrupt, within 60 days of his bankruptcy, to an indorser on a bill accepted by the bankrupt, as a provision for payment of the bill when it should become due, is not struck at by the act 1696, c. 5. No. 74. p. 92.
2. Held, (1.) That a debt contracted and payable in Barbice is not discharged by a certificate under an English commission of bankruptcy; and, (2.) That a reference entered into with the assignees under the commission, to ascertain whether the creditor was not truly debtor to the bankrupt, (but not having in view a claim against the estate,) and a judgment by the arbiter, did not shake the debt English, nor was it equivalent to proving under the commission, No. 223. p. 308.
3. An averment that a defender was bankrupt, and had executed a trust-conveyance in favour of his creditors, held not relevant to prevent his maintaining his defence in an action against him, found-



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### BANKRUPT.

- ed on a charge of fraud, without finding caution for expenses, No. 470. p. 775.
4. Circumstances under which a feu-disposition of an area of ground acquired by the son of a bankrupt from the proprietor, as to which the father had formerly been on terms for a purchase, and who consented to the sale to his son, was held not reducible under the statute 1621, c. 18. No. 434. p. 717.
  5. Held that a general adjudication under the bankrupt statute of the estates of the heir in favour of the trustee on his sequestrated estate, within three years from the death of the ancestor, constitutes complete diligence in favour of the creditors of the latter, so as to give them a preference over his estates, without the necessity of any separate adjudication, No. 433. p. 712.
  6. Circumstances in which it was held that a bill granted by a bankrupt in payment of goods purchased by him, was not liable to be set aside on the act 1696, c. 5. No. 330. p. 507.
  7. Held that an heritable bond is not liable to be set aside, as having been granted in security of future debts, the creditor having granted an obligation to pay the full amount on receiving a search of incumbrances, and having paid the money on the search being made, and infestment taken, No. 133. p. 156. and No. 445. p. 740. See *Assignment—Bill of Exchange*, 13.—*Composition-Contract—Conjunct and Confident—Condition, (Implied)—Landlord and Tenant*, 11. 14.—*Pactum Illicitum—Sequestration—Title to Pursue*, 1.

**BARON BAILIE.**—See *Public Officer*.

### BASTARD.

1. Held, (1.) That trustees and tutors appointed by the father of two natural children (to whom he had bequeathed his fortune) were entitled to apply to have one of them, who had attained nearly eleven years of age, removed from the custody of the mother; and, (2.) That the Court had power to remove the child to a more advantageous situation for education, No. 36. p. 42.
2. The mother of a natural child of six years old, to the latter of whom a large fortune had been left by the father, found, in a question with his trustees, entitled to the custody in the mean while—to an aliment for the child—and to an allowance for a house, and the expenses of education, No. 119. p. 169.
3. (1.) Connexion with a woman having been admitted about six calendar months 'or so' before the birth of her child, and the circumstances being such as to permit intercourse a month earlier, this was presumed to have taken place, and was held sufficient, with the woman's oath in supplement, to fix the paternity. (2.) Proof that the child was full-grown at birth refused, No. 239. p. 333.
4. Circumstances in which the father of a natural son was found liable in £6. 6s. per annum of aliment, No. 326. p. 503.
5. Circumstances in which it was found that the father of a bastard son, of six years of age, was entitled to get the custody of it from the mother, and place it with the schoolmaster of the parish, No. 382. p. 614.

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6. The father of a natural son who was upwards of eight years of age, having offered to take him home and instruct him in his own profession, held not liable thereafter in aliment to the mother, No. 427. p. 706.
7. Circumstances held to amount to a semiplena probatio in an action of filiation, No. 495. p. 815.

**BILL-CHAMBER.**—See *Process*, III.—*Bill of Exchange*, 11.

**BILL OF EXCHANGE.**

1. A bill which was addressed originally to one of two acceptors 'as cautioner,' and which was altered to 'conjunctly and severally,' held vitiated, No. 34. p. 40.
2. Non-onerosity only proveable by the holder's writ or oath, No. 70. p. 87.
3. A bill of suspension of a charge on a bill vitiated in the term of payment, passed simpliciter, No. 84. p. 102.
4. Whether competent, in a suspension of a charge on a bill of exchange, to prove non-onerosity by a scrutiny into the holder's private books, No. 143. p. 164.
5. Not a relevant defence in an action for payment of a bill at the instance of onerous indorsees against the acceptor, that they were aware of the acceptance being for the drawer's accommodation, or that they had postponed discussing the drawer, No. 144. p. 165.
6. A bill of suspension of a charge on a vitiated bill passed simpliciter, No. 183. p. 228.
7. A party called on to abide by a bill of exchange sub periculo falsi, having declared that he abided thereby under the qualification that the signature of the drawer and indorser was not truly his subscription, but adhibited by the declarant at his desire, according to an alleged practice of which there was no evidence, the bill held to be improved—Held, (2.) That a summons on such a bill, not stating it to be signed per procuracion, is inept; (3.) That it is a presumption of law, when a retired bill is marked paid without a special receipt, that it has been retired with the funds of the proper debtor; and, (4.) That the possession by an agent of a bill so receipted is no authority to raise an action on it, No. 214. p. 292.
8. Circumstances in which it was held, that the erasure of receipts on the back of a bill did not form an objection to the bill as a ground of action, No. 218. p. 299.
9. Held that a party sued for payment of acceptances found in his deceased agent's repositories, is not entitled to have the process resisted till the issue of an accounting, on vague allegations of intrusions, he admitting in his correspondence that the agent had made great advances on his behalf. (2.) That the presumption that bills retired with a general receipt were paid with the funds of the proper obligant, may be redargued by the terms of his own correspondence, No. 224. p. 310.
10. Circumstances in which a bill of suspension was passed simpliciter of a charge by an indorser on a bill, No. 263. p. 390.
11. A bill of suspension of a charge on a bill of exchange passed without caution, on a report by engravers that the bill was forged.

**BILL OF EXCHANGE.**

The Court refused, as incompetent in the Bill-Chamber, a diligence for recovery of other bills to be compared with that charged on, No. 527. p. 504.

12. Held that a holder of a bill, acquired at the distance of five years after it had fallen due, is entitled to the privileges of a holder prior to the term of payment, there being no marks of dishonour on the bill, No. 523. p. 498.
13. Circumstances in which it was held, (1.) That a bill having been reduced in a question between a holder and drawer, the holder could not found an action on it against the acceptor; and, (2.) That the party who had so accepted the bill, (which had been given in security of a prior debt due by his father to the holder,) and in relief of which he had obtained an heritable security from his father, and the father having become bankrupt within sixty days thereafter, could not avail himself of the security, No. 209. p. 283. See *Bottomry—Proof*, V. 1. 3.—*Husband and Wife*, 4.—*Proving the Tenor—Prescription*, IV.

**BONA FIDES.**

1. Portions of an entailed estate having been judicially sold in a process of sale under an act of Parliament, to which certain minor heirs of entail were required to be parties, and the sales not being challenged for many years, but ultimately reduced by the House of Lords, reversing an unanimous judgment of the Court of Session, on the ground that the minors had not been properly brought into Court—Held, in a question relative to a claim on the part of the heir of entail for bygone rents, that the purchasers were in bonâ fide till the judgment of the House of Lords, and were not liable for the rents till the first term after the date of that judgment, No. 379. p. 604.
2. Circumstances in which possession under a deathbed deed, pending a reduction of the deed, held to have been in bonâ fide until the affirmance of the decree of reduction in the House of Lords, No. 438. p. 725. See *Title to Pursue*, 3.

**BOTTOMRY.**—A party having taken a bill of exchange for a sum advanced for repair of a vessel in a foreign port, and thereafter taken a bond of bottomry in further security, held that the bond was null, and the party held entitled to recover on the bill, No. 457. p. 757.

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**BURGH ROYAL.**

1. Circumstances in which it was held that the mode of election of magistrates, prescribed by the set of a burgh, could not be affected by a practice, which, although it had existed for a considerable time, was not so uniform or so decisive as to destroy the set, No. 352. p. 539.
2. Held unnecessary for a town-council to have the sanction of the Court in changing their place of meeting, No. 358. p. 547.
3. Court authorized meetings for the purpose of electing a delegate, member of Parliament, magistrates, &c. in a room in a burgh, while a new gaol and Court-room were building, No. 360. p. 549.
4. An action of reduction of certain proceedings at the election of

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magistrates, by virtue of a royal warrant, ruled more than two months thereafter, dismissed as incompetent, No. 484. p. 658.

5. In a petition and complaint against a town-council for receiving a deacon and colleague alleged not to have been truly elected by the incorporation, and craving to have it so found, and that the petitioners were the only true deacon and office-bearers, held not a valid objection that the members of the incorporation were not called as parties, No. 277. p. 409. See *Jurisdiction*, 4.

**CARRIER.**—A waggoner, employed by public carriers who did not undertake to carry goods from intermediate places, having allowed a trunk to be put into the waggon on the road, his employers held not responsible for its loss, No. 452. p. 752.

**CAUTIONER.**

1. A cautioner for payment of rent, holding a letter of relief, entitled to enforce it, although it was alleged he had not intimated that the effects of the tenant had been sequestered for part of the rent, No. 96. p. 117.
2. A cautioner paying interest to an heritable creditor, and obtaining an assignation to the creditor's security, is entitled to rank on the principal debtor's estate, in virtue of the penalty for interest on the interest so paid, and the expenses of the assignation, No. 94. p. 115.
3. Held that the cautioners of a messenger were not liable in the expenses of an action against him for a breach of duty, to which they were not called as parties, No. 15. p. 21.
4. Circumstances in which it was held, (1.) That although it was agreed that a security bill should be renewed for a certain period, yet, as the cautioner had become insolvent prior to the lapse of that period, the holder was not bound to renew it, but was entitled to proceed with diligence; and, (2.) That heritable property belonging to the principal obligant, having been conveyed as a corroborative security, and without prejudice to the personal obligation of the cautioner, and the heritable security having been carried off in consequence of the titles not having been regularly completed, the cautioner was notwithstanding liable, No. 178. p. 221.
5. Held that cautioners for payment of composition-bills are not relieved by a sequestration being awarded against the principal debtor in one of these bills, No. 197. p. 252.
6. A bond for a cash-credit being signed by a company firm and the two individual partners, and also by another party and the principal for whose behoof the credit was granted—Held, in a question of relief, (1.) That there were only two cautioners, and that the individual partners and the company were not liable each in a separate share, but together only in one single share. (2.) That one cautioner, after the known embarrassment of the principal's affairs, and after a consultation as to measures for the benefit of all, is not entitled to apply indefinite payments in extinction of his private claims, No. 255. p. 368.
7. A suspension of a charge on a bill of exchange, on the ground that the charger had agreed to accept of a composition, having been

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passed on caution for the composition, and the letters having been found, orderly proceeded to the full amount of the bill—Held that the cautioner was liable to the full extent of the composition, No. 402. p. 655.

8. A party having agreed to see a debt due by another paid, provided diligence were not done till a certain day, and such delay having been granted independent of, and without reference to that letter, and thereafter delays and indulgences having been granted for three weeks to the debtor, without consent of the party so interposing, held that he was not liable, No. 412. p. 676.
9. Cautioners for executors only liable to the extent of the sum confirmed, that it be duly applied to the purpose of the executry, but not for any other sums intronitted with, No. 512. p. 479.
10. Circumstances in which it was held, that a cautioner for an executor was entitled to demand to be relieved, but that sufficient relief would be afforded by the executor accounting for intronissions, paying the balance to the party having right to it, and obtaining a decree of exoneration, No. 518. p. 487.
11. Held that the cautioners of a curator bonis appointed to persons in a state of imbecility, were liable for the price of heritable property sold by the curator under warrant of the Court, obtained in an action of sale subsequent to the date of the bond, and in which he was the sole pursuer, No. 417. p. 688. See *Prescription*, V.—*Guarantee*.

## CESSIO BONORUM.

1. (1.) Want of books not per se a sufficient ground for refusing decrees of cessio to a petty illiterate dealer. (2.) Creditors having stated charges vaguely in their papers,—circumstances in which the Court will not delay determining the question of cessio, to enable them to state them more specifically. (3.) Party having obtained cessio at end of session, liberated on caution to return to prison, if interlocutor reclaimed against, No. 134. p. 157.
2. Process of cessio dismissed, on the ground that the pursuer, after having been liberated on a sick bill, left the jurisdiction of the Magistrates of the burgh, and that the medical certificate did not bear to be 'on soul and conscience,' No. 335. p. 510.
3. Held that a debtor is in titulo to raise a process of cessio, although, before expiry of a month's imprisonment, his creditors had consented to his liberation, the warrant of liberation not having been signed till the month's imprisonment was completed, No. 184. p. 228.
4. A party who had destroyed the books of a joint adventure, of which he was a partner, found not entitled to the benefit of a cessio, and subjected in expenses, No. 272. p. 403.
5. Process of cessio incompetent at the instance of a debtor liberated in default of aliment, before expiry of a month's imprisonment, p. 152. note. See *Citation*, 1. See also No. 113. p. 133. No. 121. p. 144.

**CHURCH.**—Circumstances in which heritors were found not entitled to apply summarily for a division of a parish church, No. 444. p. 738.

## CITATION.

1. A citation to one of the creditors in a process of cessio, to appear on the 'days mentioned in the summons,' where the diet of comparance was left blank, held fatal to the process, No. 184. p. 228.
2. Held that an objection to the service copy of citation cannot be listened to in opposition to an *ex facie* correct execution not reduced, and that the act 1698, c. 12, does not extend to citations before Inferior Courts, No. 237. p. 331.
3. Circumstances in which an objection that a citation had not been given at the legal domicile, was repelled, No. 408. p. 667.
4. Circumstances in which held, that although an Englishman had resided more than four months in Scotland prior to the execution of a summons against him, as furth of Scotland, he could not object to this as irregular, No. 148. p. 171. See *Husband and Wife*, 1. — *Personal Objection*, 1. 3.

## CLAUSE.

1. A party in a missive of feu of the stance of a house in a street, agreeing to be bound by the same regulations as to pleasure-ground, &c. with the other feuars, must take a charter with the same conditions as those inserted in those of the previous feuars, No. 161. p. 188.
2. Construction of a grant of impost on wine, &c. to the City of Edinburgh, No. 340. p. 522.
3. Held, 1. That a general trust-deed of conveyance carries claims for ameliorations on a farm competent to the granter, but not payable till the end of the lease, though he die prior to that event; and, 2. That an heir having acknowledged the right of trustees to a lease, as falling under a general conveyance to them by possessing the farm for several years on a missive from them, is barred from claiming the lease in his character of heir, No. 234. p. 328. See *Entail*, 5. 6. 7. — *Succession*.

**COAL.**—A party having a reserved right to a tenth of the gross output beyond a fixed quantity of the coal of certain lands, the Court granted an interdict against the proprietor raising the coal by pits situated on other lands, No. 251. p. 355. See *Prescription*, 1.

**COGNITION, BRIEVE OF.**—1. Whether competent to cognosce a married woman at the instance of her nearest agnate; and, 2. Whether a brieve of cognition may be advocated before any procedure on it, No. 136. p. 158.

**COLLEGE OF JUSTICE.**—Held that a member of the College of Justice, who is the onerous assignee of a party not a member of it, is entitled as such to pursue an action before the Court of Session for a sum less than £25, No. 459. p. 729.

**COMMON PROPERTY.**—See *Gable—Property*.

**COMPANY PROPERTY.**—See *Society*, 2.

## COMPENSATION.

1. (1.) Whether trustees for behoof of two sets of creditors in separate deeds are to be held as one and the same; and, (2.) If so, whether one of a number of creditors for whose behoof the trust was granted, being debtor to the trustees, is entitled to plead com-

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1. Compensation on the share of his debt proportioned to his claim against the trustee, No. 95. p. 115.
2. Circumstances in which a plea of compensation was repelled, No. 140. p. 161.
3. Held that a debt against a bankrupt, subsisting prior to his bankruptcy, and the execution of a trust-deed for behoof of his creditors, cannot be pleaded in compensation of a claim by the trustee, arising subsequently to the bankruptcy and the trust-deed, No. 176. p. 219.
4. Whether compensation can be pleaded on a claim under a trust-deed, the trustees being liable only for their own actual intrusions, against a private debt due to one of the number who had trust-funds in his hands, No. 245. p. 344. See *Prescription*, II. 4.—*Trust*, 4.—*Decree in Foro—Bill of Exchange*, 9.

COMPETENT AND OMITTED.—See *Landlord and Tenant*, 9.

## COMPETITION.

1. A wife having, by her marriage-contract, vested her husband with the power of dividing the price of her estate among the heirs and bairns of the marriage; and the estate having been sold after her death, and the greater part of the price paid to the father; and he having granted bonds of provision to the younger children, and having entailed his separate estates on the eldest son, and made other provisions in his favour, and declared them to be in full of their respective shares of the price of the estate; and the father having died insolvent—Held, (1.) That in a competition with the father's creditors, the children were not entitled to a preference to the extent of the price so paid to the father, except so far as it was distinguishable from his other funds; and, (2.) That the power of division had been duly exercised, and that the children were entitled to rank *pari passu* with the other creditors, No. 252. p. 557.
2. A father having bound himself by a contract of marriage to secure certain lands to the heirs of the marriage in fee, and himself in liferent; and he having become bankrupt, and it being found that his child had personal right to the fee—Held that she was entitled to rank *pari passu* with his creditors for the price of the lands, subject to the liferent of her father, No. 229. p. 522. See *Bankrupt*, 5.—*Fee and Liferent—Legacy*, 1.—*Security, Right in*.

## COMPOSITION-CONTRACT.

1. (1.) A discharge of a debt apparently unqualified, found not to bar a claim for a composition to which it had reference. (2.) Whether a discharge under a composition-contract requires to be tested, No. 1. p. 1.
2. Whether a creditor acceding to an informal and unsubscribed offer of composition be bound by it, No. 63. p. 80. See *Cautioner*, 5. 7.

CONDITION, IMPLIED.—A party having contracted to purchase kelp at £8 per ton, and a compromise having been afterwards entered into, and having become bankrupt, whereby he was unable to implement the terms of it, found that the creditor was entitled to rank on his estate under the original contract, No. 26. p. 52.

**CONDITIONAL AGREEMENT.**—The proprietor of a piece of ground between two streets, having agreed to constitute a servitude over it *non edificandi*, on condition of all the feuars paying a certain consideration, held to be freed from his obligation by some of them refusing to accede, and the others not agreeing to make good the whole amount stipulated; but bound to repeat any sums received by him, No. 204. p. 271.

**CONDITIONAL INSTITUTION.**—See *Legacy*, 9.

**CONJUNCT AND CONFIDENT.**—Held that a party who has married the sister of the wife of another, is not thereby a conjunct person with him, No. 323. p. 498.

**CONSIGNATION.**—See *Process*, I. 6. VI. 1. 3.—*Appeal*, &c. 4.

**CONSIGNMENT.**—See *Lien*.

**CONTRACT.**—A proprietor having sold part of his lands to the Parliamentary Commissioners for making the Caledonian Canal, and accepted a certain sum in lieu of all he could claim of damage, held not barred from insisting on the performance of all the stipulations provided in the act of Parliament in favour of proprietors of land assumed by the Commissioners, No. 211. p. 287.

**CORPORATION.**

1. Held, (1.) That a seal of cause of one craft, which referred to and bestowed the exclusive privileges in the seal of cause of another craft, afforded a good title to the former; and, (2.) That a member of the guild was not entitled to infringe the privileges of a craft of which he was not a member, No. 42. p. 52.

2. Held that an action by a member of a corporation against the deacon and boxmaster personally, for repayment of sums paid under the authority of the corporation, is incompetent against them, No. 192. p. 239.

3. An incorporation having by its bye-laws fixed certain rates of annuity payable to decayed members and widows, such persons entitled to enforce their claim in a Court of law, and not bound to accept an allowance at the pleasure of the incorporation, No. 275. p. 405. See *Mortification*.

**CREDITOR, HERITABLE.**—See *Heritable Creditor*.

**CURATOR.**—Rate of interest exigible from a curator holding money of the minor in his hands, No. 283. p. 421.

**CURATOR BONIS, CAUTIONER FOR.**—See *Cautioner*, 11.

**CUSTOMS.**—Freemen Fleshers of the Canongate found entitled to exemption from certain dues; but general right of Magistrates to levy from unfreemen according to their tables reserved, No. 451. p. 751.

**DAMAGES.**—See *Reparation*.

**DEAN OF GUILD.**—Dean of Guild may summarily ordain a party to rebuild a breach in a house made without authority, No. 58. p. 71.

**DEATH.**—See *Presumption*.

**DEATHBED.**—Circumstances in which it was held that a deed granted by an heir at-law during the life of his ancestor, renouncing his legal rights, and another deed executed subsequent to his death, ratifying the former one, formed no bar against a reduction by him, on the head of deathbed, of a deed depriving him of his legal rights, No. 257. p. 374. See *Title to Pursue*, 3.—*Bona Fides*, 2.



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1. Circumstances under which the holder of a bond in which three cautioners were bound, was found not obliged to assign it to a third party; but that he was bound to do so in the event of a tender being made of full payment, No. 421. p. 697.
2. A debtor having been liberated under the act of grace, as the creditor had failed to lodge the aliment awarded.—Held competent to re-imprison him for the same debt eleven months afterwards without lodging the aliment, the creditor, however, consigning ten shillings in terms of the 6. Geo. IV. c. 62. No. 409. p. 668. See *Prisoner—Assignment*.

**DECREE, EXTRACTED.**—See *Process*, I. 13. 18.

—— IN FORO.—Held incompetent to suspend a charge given on a decree in foro by a party on the poor's roll, on the ground of counter claims which were illiquid, No. 500. p. 824.

—— IN FORO, OR IN ABSENCE.—Circumstances in which it was held that a decree was liable to be opened up, although appearance was repeatedly made for the defender, and judgment pronounced on the merits, it being alleged that she had not been fully heard in consequence of poverty, and that the action was incompetent, No. 159. p. 182.

—— IN ABSENCE.—See *Expenses*, III. 4.—*Process*, I. 7. and No. 314. p. 432.

**DEPENDENCE, ARRESTMENT AND INHIBITION ON.**—See *Arrestment*, 4.—*Inhibition*, I. 3. 4.—*Reparation*, 3.

**DILIGENCE.**—Objections to the regularity of charge refused to be listened to in a suspension, the executions being correct, No. 409. p. 668. See *Citation*, 2.—*Husband and Wife*, 4.

**DISCHARGE.**—Circumstances under which it was held that a discharge of a bond in favour of creditors did not operate as a discharge in favour of the grantor of it; and an allegation of the bond having being given *ob turpem causam* was disregarded, No. 347. p. 591. See *Bankrupt*, 2.—*Composition-Contract*, 1.—*Sequestration*, 4. 27.—*Pactum Reversum*.

**DISCUSSION.**—See *Bill of Exchange*, 5.—*Guarantee*, 2.

**DISPOSITION, ABSOLUTE OR REVOCABLE.**—A party having executed a deed proceeding on a narrative of being *mortis causa*, reserving her life rent, and dispensing with delivery, and having delivered the deed to the dispositive, held entitled to revoke and alter it, No. 499. p. 822.—See *Husband and Wife*, 3. 4.

**DIVORCE.**—See *Husband and Wife*, 1. 2.—*Title to Purvey*, 3.

**DONATION.**—An uncle having kept no regular vouchers of advances made for behoof of his niece while a child, and who was possessed of no property, but had a claim in dependence for a landed estate, held not entitled to claim repayment as a debt, on her being found entitled to possession of the estate, No. 496. p. 817.

—— INTER VIRUM ET UXOREM.—See *Husband and Wife*, 4.

**ENTAIL.**

1. An obligation by an heir of entail, in leases of the estate, to pay for meliorations, found not binding on a subsequent heir of entail,

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- the meliorations not being made in terms of the 10. Geo. III. c. 51, No. 61. p. 73.
2. Held that an action concluding for damages, at the instance of an heir of entail in possession, is competent against the executors of the preceding heir, who possessed in virtue of an unrecorded entail containing prohibitive, irritant, and resolute clauses, and who had violated the prohibitions as to the letting of the lands, No. 228. p. 320.
  3. A party having, by an antenuptial contract, bound himself to convey his estate to the heirs of the marriage, and reserved a power to make an entail prohibiting alienations and contracting debts, but not as to altering the course of succession, and having executed an entail with a prohibition to the latter effect—Held that it was ultra vires, and that the entail was null in toto, No. 266. p. 393.
  4. An heir of entail having succeeded in reducing leases granted by his predecessor in consideration of a grassum, on the ground that they were thereby set with diminution of the rental, contrary to the prohibitions in the entail, held not entitled to recover from the executors of his predecessor any part of the grassums, as if they had been anticipated rents, No. 279. p. 412.
  5. Held, (1.) That the omission of the words 'for new infeftment,' in an entail made in form of a bond and procuratory of resignation, is not fatal to it, the deed being otherwise sufficiently expressed. (2.) That a declaration that debts and deeds shall be null and void, so far as they affect the estate, is sufficient without declaring that they shall be null and void as against the contravener;—and, (3.) That a declaration, that in case an heir-substitute succeed to another estate requiring the assumption of a name and title inconsistent with those provided by the entail, he shall convey the entailed property to the next heir, subject to the fetters, does not free an heir not taking under such conveyance, but under the entail,—the fetters being held, on a sound construction, to apply to the heirs universally, No. 306. p. 467.
  6. Provisions in an entail, which were held not sufficient to supply the want of an express prohibition to alter the order of succession, No. 353. p. 541.
  7. Construction of the clauses in a deed of entail relative to the cutting of wood, and pulling down the mansion-house, No. 440. p. 780.
  8. Held, (1.) That a party pursuing, as an heir of entail, an action of reduction of the sale of part of the entailed estate sold under an act of Parliament, has no right to do so in consequence of his titles having been made up and possessed on in contravention of the original entail;—and, (2.) That several substitute heirs of entail, who joined with him in the same summons, were likewise barred from insisting in the action, because it concluded that this leading pursuer, who had so contravened, had the only just right to the lands sold, and was entitled to enter into possession thereof, No. 377. p. 598.

**ENTAIL.**

9. Circumstances under which it was held, that a party who had made up titles under an entail, as heir-male of his father, who was alive, and as called exclusive of him, and where the right of such heir-male was excluded from the succession for thirty years, was not entitled to payment of the expenses of making up titles from the trust-estate of the entailer, No. 465. p. 769. See *Stat. 42. Geo. III. c. 116.—Restitution—Repetition—Trust, 2.*

**ENTRY OF SINGULAR SUCCESSOR.**—See *Superior and Vassal.*

**EXCHANGE, BILL OF.**—See *Bill of Exchange.*

**EXCLUSIVE PRIVILEGE.**—Extent of the exclusive privilege of the town-clerk of Leith in preparing the title-deeds of properties situated within the town of Leith, No. 371. p. 579. See *Corporation, 1.—Royal Prerogative.*

**EXECUTION.**

1. An objection that a summons was dated in January 1825, and the execution in January 1824, disregarded, No. 108. p. 127.
2. A new execution by a messenger received in correction of a former erroneous one, No. 112. p. 133.
3. Circumstances in which it was held, that although an Englishman had resided more than four months in Scotland prior to the execution of a summons against him as furth of Scotland, he could not object to this as irregular, No. 148. p. 171. See *Arrestment, 1. 3.—Citation, 2. 3.—Diligence.*

**EXECUTOR.**—Circumstances in which it was held that an executor was not responsible for money deposited in an English bank which had become insolvent, No. 169. p. 205. See *Cautioner, 9. 10.—Faculty—Jurisdiction, 1.—Succession, (Moveable)—Trust, 3.*

**EXHIBITION.**—Whether a banker is bound to exhibit his books to an executor, on an allegation that the defunct did business with him, No. 83. p. 102.

**EXPENSES.**

1. Held that a party presenting a petition to apply a judgment of the House of Lords, reversing the interlocutors of the Court of Session, is not entitled to the expenses of the petition, No. 355. p. 545.
2. A petition against an interlocutor of the Lord Ordinary, and of the Inner House, on the point of expenses, in which nothing was said as to them, held incompetent, No. 65. p. 82.
3. A decree in an Inferior Court having been irregularly extracted, the Court remitted to hear parties, but found it incompetent to remit the question as to expenses incurred in the Court of Session, No. 453. p. 755.
4. Circumstances under which a charge on a decree for expenses, in name of the agent, found not affected by the principal decree being for a random sum of damages, No. 8. p. 10.
5. Competent to award expenses to pursuer, to a greater amount than concluded for in the summons, No. 394. p. 510.
6. Or where no conclusion to that effect, No. 335. p. 512.
7. Circumstances in which, although no judgment was given on the

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merits, the pursuers were found liable in expenses, No. 168. p. 205.

8. Held that expenses of answers to a petition being *found due*, it included that of opposing the petition at the bar, No. 407. p. 666.
9. Parties successful in obtaining a suspension of a decree of an Inferior Court, on the ground of want of jurisdiction, may still be subjected in expenses, in respect of their not stating the objection in proper time, No. 81. p. 99. See *Process*, I. 13. VII. 2. 6.
7. 11.—*Hypothec, (Writer's)—Mandate.*

II.—INTEREST ON. See *Appeal, Execution pending*, 2.

## III.—PREVIOUS.

1. Held that a party successful in the Inferior Court is not necessarily to be subjected in payment of all the previous expenses, before being allowed to lead additional proof in an advocacy by his opponent, No. 422. p. 699.
2. Circumstances under which a pursuer was found liable in the previous expenses, No. 25. p. 81.
3. Circumstances in which a party bringing forward a new plea, after a litigation on other points, was found not liable in the previous expenses, No. 72. p. 88.
4. Held that a party who has allowed decree in absence to pass against him, is not entitled to pursue a reduction of it till he pay the expenses of the decree, No. 851. p. 588. See *Appeal, Execution pending*, I. 2. 3.—*Process*, I. 7. IV. 2. VII. 4. 15: III. 3.—*Jury Court.*

## IV.—PRIOR TO APPEAL.

1. Competent to award to a pursuer expenses prior to an appeal to the House of Lords, who had reversed a judgment of absolvitor, which found expenses due to the defenders, No. 362. p. 550.
2. A judgment of the Court of Session, absolving defenders, having been reversed by the House of Lords, and a remit made to repel the defences, and decern, but nothing said as to expenses, held incompetent to award them to the pursuer, No. 166. p. 198.
3. Circumstances in which the Court refused to award expenses incurred previous to an appeal, No. 456. p. 757.
4. Circumstances in which the Court, after an appeal and remit, refused to award, out of a trust-fund which was the subject of dispute, to the party ultimately successful, any expenses prior to the appeal, whether on points in which he had been successful or unsuccessful, except the expense of two Jury trials, No. 497. p. 818.

EXTRACT.—See *Process*, I. 13. 18.

FACTOR.—A merchant employed as an agent to sell a mill, not entitled to charge a higher commission than that of a regular agent or writer, No. 80. p. 106. See *Agent and Client*, 10.—*Judicial Factor.*

FACULTY.—Circumstances in which a testamentary executrix, with a power of distribution, was held to have exercised that power by her latter will, in which she disposed of all the property as her

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own, and did not in any way allude to the power, No. 413. p. 679.

**FEES ON SUBSTITUTION.—See Service.**

**FEES ABSOLUTE, OR CONDITIONAL.**—A party having, by his deed of settlement, conveyed his lands to trustees, to hold them in trust for his widow's life during her life and widowhood, and on her death or second marriage, for his substitutes successively, and their heirs and assignees in fee, whom failing, another substitute, but without calling his heirs or assigns; whom failing, other substitutes, and the two first substitutes having predeceased the widow, who never married a second time, and the third substitute having executed a general disposition, and also predeceased the widow—Held, (1.) That the fee had vested in him; and, (2.) That the general disposition was sufficient to evacuate the subsequent destinations, No. 405. p. 659.

**FEES AND LIFE RENT.**

1. A party having sold his estate to his son-in-law, under burden of the price, payable at certain stipulated periods; and having declared that the interest of part of the price should be life rented by his son-in-law and his wife, and the property vested in their children, (of whom one was then alive), and the price not having been paid—Held, (1.) That the fee belonged to the children, and not to their parents; and, (2.) That they were preferable on the price to the heirs *ab intestato* of the seller, No. 801. p. 454.
2. By an antenuptial contract, £10,000 had been vested in trustees for behoof of the husband and wife 'in conjunct life rent, and of the survivor of them also in life rent,' and for the children in fee; and the husband being bound to secure her a life rent of £400 per annum, and having thereafter purchased, with part of the £10,000, an estate, the disposition of which was taken to himself and wife, 'and the longest liver, and their heirs and assigns whomsoever,'—Held, that the wife had only a life rent of the estate, and that the purchase had been made in implement of the obligation in the marriage contract, No. 375. p. 589.

**FEAR AND LIFE RENTER.**—Held, that the fear of an estate, whose right of possession was excluded during the life of the life renter, and which was bestowed on trustees, had no title to cut the growing timber, No. 196. p. 247. See *Legacy*, 9.—*Landlord and Tenant*, 13.

**FISHING.**

1. Held that a party having right of salmon-fishing is entitled to access to the banks on both sides of the river, in order to exercise his right; but that this is to be done in a way the least oppressive to the adjoining heritors, No. 174. p. 214.
2. Stake-nets not prohibited on the proper shore of the sea, No. 397. p. 641.
3. Question as to the right of proprietors of a salmon cruive fishing, to grant licenses to fish with the rod on the banks of the proprietors of estates not having a right of fishing, and to prevent those proprietors angling with the rod for trout on their

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own banks, sent to the jury court to ascertain the state of possession, No. 398. p. 650.

4. Bill of suspension of stake-nets at the mouth of the South Esk passed, but interdict refused *hoc statu*, the chargers being bound to keep an account of the fish caught, No. 483. p. 808.

FOREIGN.—See *Bankrupt*, 2.—*Legacy*, 3.—*Res Judicata*, 3.—*Jurisdiction*, 1.

FORGERY.—See *Bill of Exchange*, 11.

FRAUD.—Circumstances in which a deed was set aside, as having been obtained by fraud, No. 373. p. 583. See *Stat. 42. Geo. III. c. 116*.

FREIGHT.—Circumstances in which consignees, having taken delivery of a cargo in very bad condition, without warning the master that they would not pay the freight, were found not entitled to retain it on account of damage alleged to be sustained by the master giving a false bill of lading, No. 247. p. 358.

## FREEHOLD QUALIFICATION.

1. Held incompetent to object, by exception in the Court of Freeholders, to a certificate of valuation and decree of division *ex facie* correct, No. 350. p. 587.
2. Held that a freeholder who had conveyed away the liferent, but retained the fee of the superiority of the lands in virtue of which he had been enrolled, is entitled to have new lands added to his original qualification, sufficient of themselves to constitute a new qualification, and thereafter to restrict his original qualification to these lands; and that he does not thereby lose his place in the roll, No. 328. p. 504.
3. It having been omitted, in the prayer of a complaint against the judgment of a Court of Freeholders rejecting a claim for enrolment, to crave that the freeholders should be found to have done wrong, and that the complainer's name should be ordained to be added to the roll—Held, (1.) That it was incompetent to amend the prayer after the lapse of the four months from the date of the freeholder's judgment; and, (2.) That the complaint, as it stood, was inept, No. 341. p. 524.
4. Circumstances in which an objection to a claim for enrolment as a freeholder, that the disposition founded on was granted by the tutors of a pupil *sine decreto pratoris*, was sustained, No. 394. p. 632.
5. Circumstances in which an objection to an *ex facie* regular certificate of valuation and decree of division was repelled, No. 395. p. 635.
6. (1.) An objection repelled, that a retour produced to establish that lands were a forty shilling land of old extent, did not prove this, seeing that it included a right of patronage which did not belong to the claimant, the extent of the lands being alone retoured; and, (2.) An objection that one of the subjects specified in the descriptive clause was not valued also repelled, the total value then mentioned agreeing with the valent clause, No. 400. p. 653.
- 7 The objector to a claim of enrolment having withdrawn his op-

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petition to a complaint against the judgment of the freeholders, the Court will not grant the prayer of the complaint till intimation be made to the freeholders of his withdrawing, No. 430. p. 708. See *Valuation*.

**FORUM COMPETENS.**—Held competent, in an action of count and reckoning before a Sheriff, to restrict an heritable bond to a sum below its specified amount, on evidence to that effect, No. 11. p. 12.

**GABLE.**—Circumstances in which a fenuar, who had built a house of three stories high, was bound to pay one half the value of a mutual gable, although his neighbour's house was four stories high, No. 5. p. 7.

**GLEBE.**

1. Held, (1.) That in designing sixteen souns of pasture in lieu of an arable glebe, the presbytery are not bound to exclude small patches of arable land interspersed through it; (2.) That in peculiar circumstances, such a glebe may be designed partly out of low ground near the manse, and partly out of moor pasture at a distance; (3.) That the amount of a soun must be regulated by the custom of the district, No. 124. p. 146.

2. A clergyman held entitled, on his induction, to remove a tenant of part of his glebe without regular warning, although it was not adjacent to the manse, and was in use to be let by the incumbent, and although he did not intend to occupy it personally, No. 344. p. 527.

3. Held, (1.) That a minister cannot insist on having a grass glebe designed to him out of kirk lands adjacent to a manor place, where a glebe equally good and as convenient can be allotted to him out of other lands; and, (2.) That he is not entitled to a pecuniary allowance for the want of a glebe during the currency of a litigation in which he was unsuccessful, No. 244. p. 347.

4. Held that lands which had been in grass for upwards of 30 years, but which were of a rich soil, and had been formerly ploughed, and were kept in pasturage for the purpose of a dairy, were not grass lands in the sense of the statute 1663. c. 21, and so not liable to be designed as a grass glebe, No. 390. p. 626.

**GRASSUM.**—See *Entail*, 4.

**GUARANTEE.**

1. A letter of guarantee held not to cover transactions prior to its delivery, No. 55. p. 69.

2. A party having become bound to see the price of certain goods in the hands of a consignee accounted for, and the latter having failed to do so, and having been sequestrated, found not entitled to insist on his discussion in the first instance, No. 111. p. 132.

3. Held, in a question as to an implied guarantee of sales of goods consigned by a Glasgow merchant to agents in Jamaica, that a letter by the agents, declining to guarantee, sent by the first mail-packet, was an answer in course, although two private ships authorised to carry letters had sailed to Britain in the mean while, No. 310. p. 376.

**GUARANTEE.**

4. A guarantee having been granted for a credit to be operated on for a course of years, by drafts which were to be provided for by remittances six days before they fell due, with a stipulation that the amount of the accommodation should be reduced to a certain extent each year; and the guarantee having fallen after one year, in consequence of a change in the mode of drawing, but the parties having continued to operate on the credit, in the belief that their operations were still covered by the guarantee—Held, (1.) That remittances made after the date of the guarantee, but some time before any bills drawn under it fell due, were applicable to the liquidation of drafts then due, made and accepted prior to the date of the guarantee; (2.) That the extent of advances never having been reduced by the sureties, or the party for whom they were bound, they could not plead the clause of restriction as relieving them of any part of the obligation; (3.) That the party granting the credit had not lost his claim on the sureties, on account of no intimation having been made of the bills not having been duly provided for; and, (4.) That a charge for commission, interest, and postages, fell under 'damages and contingencies,' included in the guarantee, No. 366. p. 565.

**GUILD.**—See *Dean of Guild*.

**HARBOUR.**—Held, (1.) That the proprietor of a public harbour is not bound to expend more than the dues received in keeping it in repair, nor to assign them to a third party who offers to keep it up; but, (2.) That if any obstructions have arisen from acts of his own, or neglect to expend the dues on the harbour, he must be at the expense of removing them, No. 152. p. 178.

**HEIR-MALE.**—See *Entail*, 9.

**HEIRS AND EXECUTORS.**—See *Heritable and Moveable*, 1. 2.

**HERITABLE CREDITOR.**

1. Interdict, till a title was made up, granted against a party claiming right by conveyance to an heritable bond, with a power of sale, and who had intimated his intention to sell, No. 158. p. 182.
2. Whether a debtor entitled to object that the titles of an heritable creditor are not complete; (2.) Whether it is a sufficient objection against a sale, that the schedule of intimation is not dated, intimation not being denied; and, (3.) Whether the creditor is affected by *more* in carrying the sale into effect, No. 76. p. 96.
3. Bond for a definite sum, but declared by back letter to be intended only to cover certain obligations, held good to the extent these were actually due at the date of the bond, No. 117. p. 137. See *Sequestration*, 13.—*Cautions*, 2.—*Sale*, 3.

**HERITABLE AND MOVEABLE.**

1. Held that moveable and heritable subjects having been conveyed by a deed of settlement to trustees for certain purposes, with a power to the trustees to convert the subjects into money for the purposes of the trust, and to pay over the residue, or demer of the heritage unconverted into money, to A.; and he having



**HERITABLE AND MOVEABLE.**

died, and the heritage being unconverted, and the trust subsisting, found to belong to the heir-at-law, after the purposes of the trust were satisfied, No. 226. p. 814.

2. A party having, by his deed of settlement, conveyed his whole property to trustees, with power to convert it into money for the purpose of dividing and paying over the residue in certain shares to his children, their heirs, executors, or assigns, and one of the children having predeceased—Held, (1.) That the child's share was moveable, and descended to his executors, notwithstanding the greater part of the trust-funds being heritable; (2.) That a codicil revoking the provisions in favour of one of the children, did not extend to her right to take up the share of her brother predeceased, as his executor, No. 208. p. 279.
3. Circumstances in which a bond having a clause of interest held heritable in a question between husband and wife, No. 92. p. 108.

**HERITABLE SECURITY.**—See *Heritable Creditor*—*Forum Competens*.

**HOMOLOGATION.**—See *Legitim*.

**HUSBAND AND WIFE.**

1. Held, that a decree of divorce was ineffectual, which had been obtained by a husband who had deserted his wife, who, without her knowledge, had come to this country, and, after being 40 days there, had raised an action of divorce against her, without giving her any other notice than the usual edictal citation, both parties being natives of Ireland, never having been in Scotland, except for a single day when they were married, and she being resident in England, No. 480. p. 795.
2. A husband living in a state of voluntary separation from his wife, against whom he had raised an action of divorce, held liable to an English solicitor employed by her in relation to her defence, and also to other matters requiring his assistance, although her husband gave her an ample allowance for her maintenance, No. 481. p. 799.
3. Provision by a wife in a postnuptial contract in favour of her husband's children by a former marriage, held not revocable by her after her husband's death, No. 450. p. 749.
4. Circumstances in which a charge at the instance of a married woman, on a bill granted to her pending the marriage, was suspended, No. 481. p. 785.
5. An agent conducting lawsuits on behalf of a woman living separate from her husband, not entitled to demand from him payment of his account in actions against the husband himself when unsuccessful,—or in actions against third parties, whether successful or not, No. 64. p. 81.
6. Circumstances in which it was held that a wife was entitled, after her husband's death, to revoke a mutual disposition and deed of settlement, whereby she limited her legal rights to an annuity therein specified, to the effect of availing herself of her rights at common law, the deed being considered as truly a donation *inter virum et uxorem*, No. 372. p. 581. See *Aliment*, 2.—*Arrestment*, 4.—*Cognition*—*Heritable and Moveable*, 3.—*Sequestration*, 18. 21.—*Title to Pursue*, 3.—*Usury*.

**HYPOTHEC, LANDLORD'S.**—Circumstances in which it was held, that certain horses reared and worked on a farm, and which were claimed as the property of the son of the tenant, living in family with the tenant, were liable to the landlord's hypothec, No. 221. p. 304.

——— **WRITER'S.**

1. An agent employed to borrow money has a hypothec over his client's title-deeds for the account paid by him to the lender's agent, No. 94. p. 113.
2. Held that an agent is entitled to decree for expenses in his own name, although it be alleged that his clients are solvent, and that thereby the party against whom they are awarded will be deprived of a plea of compensation, No. 273. p. 403.
3. The agent in a suit where the parties had made a compromise, not entitled to decree in his own name for expenses found due to his client, who was subjected in a larger amount to his opponent by the same interlocutor, which also directed the one account to be deducted from the other, No. 393. p. 631.
4. An agent having allowed decree for expenses to go out in his client's name, still entitled to appear in a suspension brought by the defender, and obtain decree for these expenses in his own name, No. 426. p. 704.
5. An advocate having failed to expedite his letters of advocacy within ten days of the passing of the bill, and the respondent having obtained a certificate to that effect, found, (1.) That the respondent was entitled to his expenses, although the letters were afterwards expedite; and, (2.) That, on the respondent leaving the country, the agent in the Inferior Court, in whose name decree for expenses there had gone out, was entitled to sist himself in his place, No. 493. p. 814. See *Sequestration*, 14.

**IMPLIED CONDITION.**—See *Condition*.

——— **GUARANTEE.**—See *Guarantee*, 3.

——— **OBLIGATION.**

1. The Magistrates of a burgh being bound to support the tacksmen of their customs in prosecuting for payment of dues 'on a representation made to them for that purpose, and having their sanction;' and having received an intimation under protest of the tacksman's intention to prosecute for certain dues, and calling on them to support him—Held, that their returning no answer to such protest did not infer a sanction of the prosecution, and liability for the expenses, No. 464. p. 767.
2. Circumstances in which trustees for the creditors of an insolvent debtor were held liable for the expenses of an accountant's report in a submission to which the insolvent was the estimable party, but in which the trustees had the real interest, and in which they had taken an active part, No. 482. p. 710.

**IMPRISONMENT.**—See *Bill of Exchange*, 7.

**INDEFINITE PAYMENT.**—See *Guarantee*, 4.—*Conditioner*, 6.

**INFANT.**—See *Proof*, V. 1.

**INHIBITION.**

1. Held, that a defender, against whom an inhibition on a depending action was executed, was not entitled to insist on the pur-

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- suer accepting payment, and finding caution to repeat, with full interest, No. 33. p. 40.
2. The House of Lords having reversed that part of a judgment of the Court recalling an inhibition, which ordained it to be scored in the record, the Court allowed the petition to apply the judgment of the House of Lords, with the deliverance thereon, to be inserted in the register, No. 122. p. 144.
3. Held, (but reversed) that inhibition and arrestment on a dependence cannot be recalled without caution, on account of alleged uncertainty of success, or of counter claims, No. 40. p. 51.
4. Court refused to restrict the caution to be found on recall of an inhibition used on a depending process, to a sum less than was agreed to by the inhibitor, the claim in his action being specific, No. 491. p. 812. See *Mandate*.

**INSURANCE.**

1. Held, that the overturn of a vessel in a dry harbour, occasioned partly by accident and partly by the state of the weather, whereby damage was sustained, was within the usual general terms of a policy of insurance, No. 14. p. 19.
2. When a policy of insurance is not delivered, it is competent to prove by parole the nature of the agreement and extent of risk insured against, No. 369. p. 575.
3. The master of a vessel when in pilot's fareway, and difficult navigation, but where no licensed or branch pilot is to be had, bound to take the best assistance of persons locally acquainted with the navigation which he can procure, and his omission to do so held to liberate the underwriters, No. 411. p. 670.

**INSTITUTION, CONDITIONAL.**—See *Legacy*, 6.

**INTERDICT.**

1. Circumstances in which it was held, that although a party who was accused of breach of interdict could not be found guilty of that offence, yet the complaint against him was justifiable and necessary, and therefore expenses were found due, No. 219. p. 302.
2. An inferior Court having granted an interim interdict, and the Lord Ordinary on the Bills having, on an advocacy, recalled it, a petition and complaint for breach of interdict held competent, No. 475. p. 785. See *Coal—Landlord and Tenant*, 14.—*Heritable Creditor*, 1.

**INTEREST.**—Circumstances in which it was held that a Bank was not liable in interest on arrears of dividends of a share of the Stock, No. 460. p. 762. See *Curator*.

—(ON EXPENSES.)—See *Execution pending Appeal*, 2.  
—(COMPOUND.)

1. Circumstances in which a bond granted for the amount of a debt made up, after the lapse of fourteen years, on the principle of compound interest, was sustained, No. 305. p. 463.
2. Circumstances in which the debtor in a bond was found liable in compound interest by biennial accumulation, No. 386. p. 620.

**INTEREST, PENAL.** See *Sequestration*, 19.

**IRRITANCY.** See *Landlord and Tenant*, 4, 8, 13, 18.—*Title to Possess*, 2.

**JUDICIAL ADMISSION.**—A messenger having received a sum of money for a creditor who employed him, and an action having been brought against him by the creditor for payment more than three years thereafter, and he having admitted the receipt of the money, but alleged that he had paid it to the creditor.—Held, (1.) That he was bound to prove the alleged payment; (2.) That the triennial prescription did not apply, No. 146. p. 170.

—**EXAMINATION.**—Circumstances in which a party was held not bound to disclose from what source he acquired a large sum of money, No. 48. p. 58.—See *Process*, II. 5.

—**FACTOR.**—Circumstances in which a petition for a judicial factor refused, No. 85. p. 103.

—**REFERENCE.**—Circumstances in which it was held, that a party who had agreed to a judicial reference was barred from objecting that he had not been heard before the referee on the effect of a proof taken by him, No. 302. p. 459.

**JURISDICTION.**

1. An executor of an English will, relating solely to English property, being resident in Scotland, may be sued for implement in the Court of Session, No. 90. p. 107.
2. Held, (1.) That the Court of Session has jurisdiction to review and set aside the proceedings of a presbytery in the trial of a schoolmaster under the statute 43. Geo. III. c. 34. in point of form, where they exceed their powers, although review is excluded; and, (2.) That it is an excess of powers, where the statute requires the necessary proof to be taken, not to put the proof in writing, No. 150. p. 174.
3. (1.) That it is a sufficient deviation from the above statute to warrant the interference of the Court, that in a serious charge they have not served the schoolmaster with a libel; that they have proceeded without a regular complaint, and that the confession on which the decree of the presbytery bears to have preceded, was not signed by him; and, (2.) That having acknowledged him as schoolmaster, and removed him specially as such, the presbytery cannot object to his title, that he was not regularly inducted into the office originally, No. 338. p. 514.
4. Held competent for the Magistrates of a Royal Burgh to pursue before the Court of Session a declarator of their jurisdiction under a Crown charter, No. 227. p. 319.
5. The Court dismissed, as incompetent, an action of reduction of a matriculation of arms, the party pursuer not setting forth that he had right to the arms in question, No. 256. p. 371.
6. Held, (1.) That it is incompetent for Justices of Peace of one county to indorse a civil warrant on a decree of the Small Debt Court of another county; and, (2.) That an apprehension and imprisonment in virtue of such indorsement is illegal, No. 300. p. 453. See *Arrestment*, 1.—*Forum Competens*—*Interdict*, 2.—*Poor*, 1.—*Small Debt Act*—*Road*, 2.—*Sale*, 1.

**JURY COURT.**—Verdict set aside, and a new trial granted; and party who had obtained the verdict found entitled to expenses, previous

## JURY COURT.

by incurred, on finding caution to repeat, No. 363. p. 551. See *Obiter Dictum—Testament*.

JUSTICES OF THE PEACE. See *Jurisdiction*, 6.—*Small Debt Act*.

KING'S PRINTERS.—See *Royal Prerogative*.

KING'S PROPERTY.—See *Poor*, 2.—*Royal Park*.

## LANDLORD AND TENANT.

1. Held (but reversed) that a regulation in general articles relative to all the leases on an estate, that the tenants should not at any time carry away the fodder, but should use it on their farms, did not apply to the last year of the leases, No. 12. p. 13.
2. Held that a tenant having, in terms of a permission in his lease, assigned it to one of his sons, and the landlord having by his acts and deeds approved of the assignee, the liability of the original tenant and of his representatives was discharged, No. 20. p. 25.
3. Circumstances in which it was held that a tenant of an urban subject for one year was not entitled to sublet it without the consent of the landlord, No. 75. p. 95.
4. A tenant, being interpellated by diligence from payment of rent, is not liable to have his lease irritated under the A. S. Dec. 14. 1756, as being in arrear of rent, No. 185. p. 229.
5. Under an improving lease, the terms of removal in which were Whitsunday as to the grass, and the separation of the crop as to the arable land—Held, (1.) That the tenant was not bound to remove at Whitsunday from arable land which had been natural pasture at the commencement of the lease, but brought in by him in the course of it. (2.) That he was bound to remove at that term from all grass, whether growing on arable or pasture land; but, (3.) That under 'grass' could not be included the crop of hay arising from seed sown with the penult crop, and yielding the first crop in the year of removal; and, (4.) That where the landlord has the stipulated quantity of grass left on the whole lands let, he cannot object to the want of a relative proportion on the particular farms into which the lands had been sublet, No. 203. p. 267.
6. A summons of removing, praying to have the tenant ordained to make payment of, instead of 'to find caution for the arrears due,' held, notwithstanding, to fall under the A. S. Dec. 14. 1756, and not liable to be advocated without caution, but allowed, on juratory caution, in the special circumstances of the case, No. 249. p. 353.
7. A landlord having given part of a farm to road trustees, for the purpose of making a road, held not entitled to payment of the rent of that ground; leaving the tenant to obtain indemnification from the trustees, but bound to allow a deduction of rent effeiring to the ground so conveyed, No. 319. p. 499.
8. Circumstances under which tenants who had incurred an irritancy of their lease by non-payment of rent, were reponed against it, No. 345. p. 530.
9. A tenant of a piece of ground in natural pasture at entry, the term of removal from which was stipulated to be Whitsunday, having, under a permission in his lease, brought it into cultivation

## LANDLORD AND TENANT.

- during the currency, and having acquiesced in the refusal of a bill of suspension of a decree of removing as at Whitsunday—Held, (1.) That under the lease he had no right to a way-going crop; (2.) That the refusal of the bill of suspension formed *res judicata* as to his claim, so far as founded on the lease; and, (3.) That he could not support this claim by a decree-arbitral, on which he had omitted to found in his bill of suspension, No. 254. p. 365.
10. A tenant getting neither straw nor dung at his entry, and being taken bound to leave a year's dung as steel-bow at his removal, on being allowed the 'price' of the dung so left, held entitled to its full value, No. 295. p. 446.
  11. Circumstances in which it was held, that a lease having been granted to three tenants, excluding assignees, and two of the tenants having, without consent of the landlord, assigned their interest to the other tenant, and he having been deprived of possession during his absence from Scotland, and his estates being sequestrated, he was not entitled, in a question with the landlord and the co-tenants, to be restored to possession, although he offered caution for implement of all the obligations incumbent on him, No. 299. p. 450. (*Affirmed in H. of L.*)
  12. Held, (1.) That a party who had made an offer for and obtained an assignation to a lease, must be presumed, in the absence of all proof, to have seen the lease, and to be aware of a restriction as to the power of subsetting. (2.) That the using a shop in a good situation in a town, formerly occupied by a silk-mercator, as a show-room for exhibiting wax figures, is an invasion which the landlord is entitled at common law to prevent, No. 414. p. 683.
  13. (1.) Whether competent for a liferentrix to pursue a removing under an irritancy, where the lease was granted by her and the fiar jointly. (2.) Whether an irritancy must be declared before decerning in a removing; and, (3.) Whether competent to purge after extract, No. 9. p. 11.
  14. Held incompetent to interdict a tenant from making use of the subjects let to him, on the allegation that he is notour bankrupt, and an action of removing raised against him, No. 462. p. 766.
  15. Held that a tenant having, towards the termination of his lease, bound himself to remove without warning, cannot object that warning has not been given, No. 98. p. 118.
  16. Irritancy of a tack under the A. S. Dec. 14. 1756, purgeable, by consignation of the arrears before extract, without finding caution for the five succeeding crops, No. 181. p. 227. See *Globe*, 2.—*Prescription*, III. 2.—*Promise-Reparation*, I. 4.—*Title to Purse*, 2.
- LAND-TAX, REDEMPTION OF.—See *Stat. 42. Geo. III. c. 116.*—*Reparation*, 6.—*Repetition*.
- LEGACY.
1. A testator having, by means of a trust-deed, bequeathed £500 to a woman in liferent, and her children in fee, but provided that in the event of her death without lawful issue, the money should return to and form part of the residue of his estate, and the life-

LEGACY.

- rentrix having a son who predeceased her, leaving two children, and she having died, held that the children of the son were preferable to his creditors, No. 191. p. 237.
2. Legacies directed by a defunct to be paid by a party to whom the greater part of his property was gratuitously disposed, and declared to be a burden on the succession, held not to be revoked by the deceased having entered into a contract of exchange of the property so burdened, and not evacuated by the repudiation of the donee, and his taking up the succession under another gratuitous disposition from the heir of the deceased, No. 149. p. 172.
3. A legacy having been bequeathed to foreigners, and which, in consequence of a dispute, was compounded in a foreign country for a specific sum, but which was agreed to be paid in this country, and full and ample discharges granted—Held that the legacy duty was a burden on the legacy so compounded, and that it was payable by the legatees, No. 164. p. 192.
4. A testator having appointed £ 200 to be laid out at interest for J. S., and £ 100 to be paid to her at marriage—Held that both the interest and the £ 100 were due, No. 177. p. 220.
5. A party having, in a trust-deed of settlement, bequeathed to his trustees £ 500 each as a mark of his friendship, and the further sum of £ 105 to purchase a hoghead of claret as a recompence for their trouble in the management of his affairs, and as a further mark of his affection, and one of the trustees having declined to act—Held that the £ 500 were due to him and his representative, No. 222. p. 306.
6. A legacy having been left by a joint trust-deed of settlement made by two parties, and it being declared that the deed should be irrevocable on the death of either of them, and that, in the event of the legatee predeceasing the survivor, the legacy should fall to her 'executors or nearest of kin,' and she having survived one of the testators, but predeceased the other—Held that the legacy belonged to the nearest of kin, No. 261. p. 384.
7. Circumstances in which a party was found entitled to a legacy, although his Christian name was different from that expressed in the testament, the Court being satisfied that he was the party intended, No. 437. p. 724.
8. Held that a bequest made to the 'lawful heirs of 'E. P.' meant those alive at the death of the testator, No. 99. p. 119.
9. A testator having bequeathed his effects to his sisters and their heirs, in the event that after due advertisements for them they should claim within five years from his death, failing which, to certain other persons; and having thereafter restricted the eventual right of these persons to a life term, with the exception of one of them to whom he gave the fee; and no claim having been made by the sisters of their heirs; and one of the life-termers having died during the currency of the five years—Held, (1.) That the right did not vest in these eventual legatees till after the expiration of five years—that the interest arising during their

**LEGACY.**

currency must be added to the capital sum—and that the right of the party dying in the mean while lapsed; and, (2.) That the far was entitled to payment of the share of the fund corresponding to the share of each decessing liferenter, on the death of each of them taking place, No. 471. p. 776.

10. Held, (1.) That a bequest to trustees was valid, by which a testator declared, that 'it is my wish that such remaining means and estate shall be applied in such charitable purposes, and in bequests to such of my friends and relations as may be pointed out by my said dearly beloved wife, with the approbation of the majority of my said trustees; (2.) That the nearest of kin, although appointed a trustee, and deriving benefit from such deed, was not barred from objecting to it, having acted under protest, No. 364. p. 563.

**LEGITIM.**—A party having for several years accepted the interest due annually on certain provisions left her in her father's deed of settlement, and declared to be in lieu of legitim, &c. found not to be barred of her right of election, in respect she was all the time entirely ignorant of the amount of her claim of legitim, No. 189. p. 234.

**LIEN.**—Goods having been purchased by a joint adventure, of which the bills of lading were taken in name of one of the partners, who, without the knowledge of his co-partner, delivered them to a third party, by whom they were consigned to an agent along with goods belonging to himself; and an advance having been made by the agent to the third party on the consignment—Held, in a question between the agent and the co-partner, (1.) That the goods of the joint adventure were subject to a lien for the money advanced at the time of the consignment; (2.) That they were not subject to a lien for the general balance due by the third party to the agent; but, (3.) That the agent was entitled to apply them, *primo loco*, in extinction of the special advance, so as to enlarge his security over the goods of the third party for payment of the general balance, No. 376. p. 407.

**LES ALIBI PENDENS.**—An action of damages for slander before an Inferior Court, found a sufficient defence against a subsequent action of the same nature in the Court of Session, No. 130. p. 152.

**LYON COURT.**—See *Jurisdiction*, 5.

**MALICE.**—See *Reparation*, 3.—*Slander*, 2.

**MANDATE.**—Inhibition having been used nimiously and oppressively by an agent, without a mandate from his client, who was furth of Scotland, the Court recalled it, and found the agent, as well as his client, liable in expenses, No. 361. p. 549.

**MANDATORY.**

1. Circumstances in which it was held, that a mandatory was liable for the expenses of a process of reduction, although he disclaimed the character in that process, No. 150. p. 182.

2. A pursuer not obliged to go on with an action when the defender is abroad, and has left no mandaté, No. 175. p. 219.



**MANDATORY.**

3. Held that a defender who is out of Scotland must sist a mandatory, No. 100. p. 287. See *Poor's Roll*.

**MANSE.**

1. Held, (1.) That a minister of a royal burgh, with a landward district attached, has no legal claim to a manse under the act 1663; (2.) That special circumstances may give him such a claim; (3.) That presbyteries have no jurisdiction relative to a claim for a manse, except in so far as it is founded on the Act 1663, No. 81. p. 99.
2. Circumstances in which heritors were obliged to build a new manse in a new situation, although part of the old building was capable of being repaired, No. 354. p. 543.
3. A clergyman having, by application to the presbytery, obtained the erection of a new manse by the heritors, on a piece of ground not originally the glebe of the parish; and having, after a possession of upwards of thirty years, given it up to a party claiming right thereto, without dispute, or intimation to the heritors; and having obtained decree from the presbytery for a second manse to be built on the old glebe, the Court suspended it *hoc statu*, till he should raise a proper action for determining the right to the former manse; and held that heritors were not barred from bringing a suspension, after the clergyman had nearly erected the manse out of his own funds, no demand having ever been made on them, and they being non-resident, No. 506. p. 832.

— RENT.—See *Process*, I. 13.

**MARRIAGE.**—Circumstances in which it was held that a marriage *in facie ecclesie* could not be affected by the conduct of the man being inconsistent with the idea of a valid marriage having been constituted, and that he could not be barred *personalis exceptione* from maintaining its validity, No. 198. p. 254. See *Proof*, III. 1. VI. 1.

**MARRIAGE-CONTRACT.**—Question raised, but not decided, whether it is a sufficient rational cause to support a bond granted by a husband, (whose postnuptial marriage-contract provided all the property of the spouses to the longest liver in life, and the children of the marriage in fee,) that its object was to restore to one of his wife's two daughters by a former husband, a share of their father's property left by one of them to her mother by a testament executed in minority, this property having been changed from heritable to moveable by the act of a factor *loco tutoris*, No. 419. p. 692. See *Entail*, 3.—*Husband and Wife*, 3.—*Proof*, VI. 1.

**MASTER AND SERVANT.**

1. A master agreeing to furnish clothes to a servant out of livery, the clothes remain the property of the master, No. 115. p. 134.
2. Summary warrant of imprisonment a competent mode of enforcing performance of a contract of service, No. 142. p. 163.
3. Held incompetent, after the expiration of a written agreement of service, to compel a workman, by summary imprisonment, to work for a certain number of days, on an allegation that he had been absent for a corresponding time during the currency of the agreement, No. 307. p. 471.

MASTER AND SERVANT.

4. A master held liable in reparation of an injury inflicted by his servant through carelessness in performing work committed to him by the master, No. 478. p. 790. See *Carrier—Penalty*, 1.

MEDITATIONE FUGÆ WARRANT.—Court passed bill of suspension and liberation of a *meditatione fugæ* warrant, on the ground that the creditor had not in his oath sufficiently specified the particulars of his debt, No. 472. p. 780. See *Process*, VII. p. 8.—*Reparation*, 3.

MESSANGER.—Held that a messenger cannot be a procurator before a Sheriff Court, No. 50. p. 61. See *Cautioner*, 3.

MINISTER'S SALARY.—See *Society*, 1.

MORTIFICATION.—Held, (1.) That a corporation may sue by a committee appointed by a corporate act; and, (2.) That any individual having interest in a charitable fund may sue the managers to account for their administration, No. 207. p. 276.

MOVABLE SUCCESSION.—See *Succession—Heritable and Moveable*.

MULTIPLEPOINDING.—See *Process*, VI.

NAUTE CAUPONES, &c.—(1.) Whether the keeper of a lodging-house falls under the edict; and, (2.) Housebreaking held a *vis major* so as to protect from liability for articles stolen, No. 66. p. 83. See *Carrier*.

NOBILE OFFICIUM.—See *Bastard*, 1.—*Trust*, 5.

NUISANCE.—See *Public River*.

OATH IN SUPPLEMENT, OR REFERENCE.—See *Proof*, IV. V.

OBITER DICTUM.—An opinion in law being stated by a Judge in delivering his charge to a Jury, but at the same time observing that it was unnecessary to the cause, is to be considered as *obiter dictum*, and not to form the ground of an exception for misdirection, No. 242. p. 342. (*Affirmed in H. of L.*)

OUTLAWRY, *Effect of Reversal of*.—See *Sequestration*, 1.

PACTUM ILLICITUM.—A creditor having privately obtained bills from a bankrupt, as the price of his agreeing to a voluntary composition and discharge, and the amount of these having been paid to onerous third parties to whom he had indorsed them, held liable in repetition, in an ordinary action at the instance of the bankrupt and the cautioners for his composition, No. 324. p. 499.

PACTUM DE QUOTA LITIS.—Contract to advance expenses of a lawsuit, on receiving a per centage on the sum recovered, held legal, and not voided by the bankruptcy of the party, the advances, being still secured,—nor by delay to make these advances occasioned by the failure of the litigant to implement his part of the agreement, No. 292. p. 438.

PARENT AND CHILD.—See *Aliment*, 3.—*Bastard*, 1. 3.

PARTNERSHIP.—Held, (1.) That the partners of a company are bound by the terms of their contract, although the company have announced that they are to cease doing business, but are to remain undissolved, for the purpose of winding up their affairs; and, (2.) That a party who was appointed, by a written commission, to act as manager under a committee of the partners, and to whom no conveyance of the funds had been made, was a mere officer or servant of the company, and had no right to object to their reso-

**PARTNERSHIP.**

Intions, or to resist assigning a claim on a sequestrated estate, made by him as manager, although it was declared in one of the resolutions, prior to his commission, that he was to be trustee, No. 368. p. 572. See *Poinding*, 1.—*Cautioner*, 6.

**PENALTY.**

1. Penalty in a bond of caution for the performance by an apprentice of the obligations in his indenture, held subject to an equitable restriction, No. 391. p. 484.
2. Competent to charge on the penalty in a registered obligation, to the extent of reasonable expenses incurred in consequence of non-implementation, No. 391. p. 623.
3. Held that a creditor under a bond, who has incurred expenses in defending it in a question with a third party, is entitled, in claiming on the estate of his debtor, to rank for these expenses under his penalty, notwithstanding that, in the litigation with the third party, the Court had found no expenses due, No. 443. p. 737. See *Cautioner*, 2.

**PERSONAL OBJECTION.**

1. Held that the agent of a respondent in an advocacy having agreed to hold the letters executed, or else to proceed by protestation, and not having done so, and the letters having been executed, the respondent was barred from objecting to an irregularity in the citation, No. 387. p. 623.
2. A party having opposed a valuation of lands at a particular period, agreeably to the terms of a mutual contract, till that period had passed, held not entitled afterwards to insist that the value should be calculated as at that period, No. 407. p. 666.
3. A party held barred from objecting to the irregularity of a citation, by having written to the messenger, acknowledging that he had duly received it, No. 467. p. 773.
4. A party having taken an apprentice in the knowledge that he was under indentures to another master, not entitled to compel his services in a question with the latter, No. 41. p. 51. See *Clause*, 3.—*Judicial Reference—Jurisdiction*, 3.—*Munse*, 3.—*Marriage—Legacy*, 10.—*Legitim—Sale*, 6.

**POINDING.**

1. Whether competent, on a decree against one partner, to poind the effects of the partnership, No. 92. p. 39.
2. Question raised, but not decided, as to the competency of poinding bank-notes, No. 293. p. 439.

**POLICE ASSESSMENT.**—See *Register—House*.

**POLICE, COMMISSIONER OF.**—See *Process*, V. 2.

**POOR.**

1. A petition and complaint accusing a kirk-session of improperly delaying to give judgment on an application by a pauper for alimony, sustained as competent, but dismissed on the merits, No. 856. p. 545.
2. The Crown held liable in poor's rates, on property acquired from a subject, No. 73. p. 69.

**POOR'S ROLL.**—Held that a pursuer on the poor's roll, and residing be-

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yond the jurisdiction of the Court, is not bound to give a mandatory, who shall be liable in expenses, if awarded, No. 359. p. 548. See *Decree in Foro*.

POSSESSORY RIGHT.—See *Church*.

PRESCRIPTION, LONG.—Prescriptive possession of coal, No. 406. p. 665.

## II. —, TRIENNIAL.

1. Circumstances in which it was held that an open account contracted in England by a Scotsman who died abroad in the King's service, and of which the last article had been delivered recently after his death; and it being admitted by his executor that he had not paid the account,—the triennial prescription did not apply, although more than three years had elapsed from the date of the last article, No. 322. p. 496.
2. A party having obtained payment of money on behalf of another, not entitled to plead the triennial prescription, although otherwise liable for the debt, No. 267. p. 396.
3. Circumstances in which the question was raised, whether an account which was current at the death of the ancestor was prescribed, although a new one was opened with the tutors of the heir, No. 288. p. 427.
4. (1.) Circumstances in which a party was barred from pleading the triennial prescription; (2.) An agent who had rendered an account of business held bound by it, and not entitled to claim on a new and enlarged account for the same business; and, (3.) A client entitled to plead compensation for outlay on behalf of his agent, No. 370. p. 577.
5. The constitution and non-payment of a debt being admitted, the plea of the triennial prescription not admissible, No. 154. p. 189. See *Judicial Admission*.

## III. —, QUINQUENNIAL.

1. Held that an action of reduction founded on a holograph missive, which had been asleep for five years, was not affected by the quinquennial prescription, No. 87. p. 105.
2. That a process of sequestration is a bar to the quinquennial prescription of rents, No. 425. p. 702. See *Arrears*, 2.

IV. —, SEXENNIAL.—One of two joint obligants, in a bill having depened, after the lapse of six years, that he merely signed the bill at the request of the drawer, without receiving the value, that the value had been paid to the other acceptor, and that he had not paid the bill, held liable, No. 396. p. 536. See No. 19. p. 24.

V. —, SEPTENNIAL.—Held that judicial cautionary obligations are not subject to the septennial prescription, No. 425. p. 702.

PRESUMPTION.—Two persons having gone abroad as sailors in 1791, and never having been thereafter heard of, the fee of certain sums bequeathed to them, whom failing, to substitutes, ordered to be paid to the latter, on finding caution to repeat, No. 126. p. 149. See *Landlord and Tenant*, 12. *Bill of Exchange*, 9.

PRICE, RETENTION OF.—See *Sale*, 2.

**PRISONER.**

1. An imprisoned debtor not entitled to liberation on the death of his incarcerating creditor, No. 171. p. 211.
2. Warrant granted for liberation of an imprisoned debtor to attend diets of proof, during vacation, in a process of cessio, on finding caution to return to jail, No. 502. p. 829. See *Process*, II. 6.—*Debtor and Creditor*, 2.

**PROCESS, I.**

1. The Court, on the application of a single creditor, granted warrant for a meeting of creditors to elect a new trustee, for the purpose of appearance as respondent in an appeal to the House of Lords, No. 348. p. 533.
2. An application to apply a judgment of the House of Lords must be made, not by note, but by petition as formerly, No. 240. p. 335.
3. Although a party does not appear at the bar when a case comes to be advised, yet, if he has given in pleadings, the Court will judge on the merits, No. 105. p. 125.
4. Not competent to try the question of right to an office in the form of a petition and complaint, No. 107. p. 126.
5. A party appearing to be facile, and giving both a disclamation and a mandate, a remit made to the Inferior Judge to examine him, and report to the Court, No. 108. p. 127.
6. Circumstances in which consignment by the defender of the sum pursued for, ordered *in limine*, No. 173. p. 214.
7. Held, that under a remit to recall a decree in absence, and receive defences, without any thing being said as to previous expenses, the Inferior Judge has no power to make the payment of these a condition of receiving the defences, No. 286. p. 425.
8. Court adhered to a judgment of the Lord Ordinary, refusing to conjoin two processes *in limine*, before advising condescendences in them, No. 313. p. 481.
9. Judgment repeated *pro forma*, in a competition of briefs with the son and heir of a party in a competition, with whom a decision had been pronounced and taken to appeal, No. 325. p. 503.
10. A representation lodged within the reclaiming days found competent, although not marked by the collector of the fee-fund, No. 54. p. 68.
11. A reclaiming note not having been marked with the reclaiming day, by an Inner House clerk, refused as incompetent, No. 401. p. 654.
12. A party not allowed, at the last stage of the cause, to found on transactions as to a guarantee not libelled on, No. 55. p. 69.
13. Held, (1.) That a conclusion for manse rent against heritors, 'conjunctly and severally,' is incompetent; (2.) That decree having been taken against one heritor for his proportion, an extract as against him alone for the whole sum is irregular, and cannot be the foundation of diligence, either for the principal sum or expenses found due by himself alone, and decree for which has been allowed to go out in the agent's name; and, (3.) That a single heritor found liable in expenses in a litigation carried on by him-

## Process, I.

- self alone, has no claim of relief against the other heritors, No. 195. p. 246.
- 14 Decree having gone against a party in default of obtempering an interlocutor ordering a production of accounts, repozed on payment of expenses since the date of the interlocutor and producing the accounts, &c. within a certain short space, No. 231. p. 325.
  15. A petition against the interlocutor of a Lord Ordinary on the Bills of the Second Division to the First irregular, although the process of sequestration is in the latter Court, No. 60. p. 72.
  16. Held competent to enroll before a Lord Ordinary of the one Division an action of transference and wakening, having reference to another action before a Lord Ordinary of the other Division, No. 388. p. 624.
  17. Held that forthcomings on arrestments used under a decree and interim execution pending appeal ought to be brought before the Division which gave decree, No. 418. p. 691.
  18. The Court refused a summary petition praying for recall of an extract of a decree, on the ground that it had been issued erroneously against the party complaining, No. 429. p. 707. See *Agent and Client*, 3. 4. 5.—*Bankrupt*, 3.—*Freshold Qualification*, 3.—*Interdict*, 2.—*Poor*, 1.

## II. — ADVOCATION.

1. Whether an advocacy without leave be competent, on the ground of the incompetency of an action in respect of an alleged *res judicata*, No. 6. p. 8.
2. (1.) A bill of advocacy of an order of ejection in a process of removal, refused as incompetent under the Judicature Act; and, (2.) A bill of suspension of *contingentiam* likewise refused, No. 274. p. 404.
3. Not competent to advocate a process merely in *medium probationis*, No. 141. p. 162.
4. Circumstances in which it was held competent, in an advocacy to an objection to the mode of proof, to remit with instructions on a question as to the title of the pursuers, No. 298. p. 439.
5. A bill of advocacy against an interlocutor of a Sheriff, ordering a judicial examination of a party, refused as incompetent, No. 297. p. 449.
6. On a bill of advocacy of a refusal by the Magistrates of a burgh to liberate on a sick bill, the Court directed application for relief to be made to them by petition, p. 199. *Note*. See *Condition—Hypothec*, *Writer's*, 5.—*Landlord and Tenant*, 6.—*Infra*, VII. 10.

## III. — BILL-CHAMBER.

1. A petition incompetent after the issuing of a certificate of refusal of a bill of suspension, and after execution done by applying the judgment in the Inferior Court, No. 57. p. 79.
2. A bill of suspension having been presented during vacation without caution, and one Ordinary having passed it, but another having passed on caution—Held that the bill was not to be considered as passed *simpliciter*, No. 147. p. 170.

PROCESS, III. BILL-CHAMBER.

3. Held that a bill of suspension having been refused with expenses, and a subsequent one passed, but the decree for expenses not having been brought under the review of the Inner House, was final and effectual, No. 151. p. 178.
4. The reclaiming days in the Bill-Chamber held to run from the date of the interlocutor, although no certificate of refusal has been issued, No. 182. p. 227.
5. The Court refused to prohibit a certificate of refusal of a bill of suspension from being issued till after the meeting of Parliament, to enable the party to present a petition of appeal, No. 186. p. 230.
6. Held, (1.) That the rule of the A. S. 14th June 1799, as to presenting a second bill to the next succeeding Ordinary in the Bill-Chamber, is in desuetude; and, (2.) That a first bill without caution having been passed during vacation on caution, it is competent to present a second bill, No. 233. p. 327.
7. A marking on a bill by the Lord Ordinary, 'I incline to pass,' and signed by his Lordship, held to have passed the bill so as to render a subsequent interlocutor of refusal by another Ordinary inept, No. 250. p. 355.
8. A bill of suspension being presented without caution, allowed to be seen on caution by an Ordinary in vacation, and thereafter refused by the Ordinary on the Bills in respect of no caution, on a petition reclaiming only against the last interlocutor, the Court allowed the prayer to be amended so as to reclaim against both, and thereafter passed the bill, No. 116. p. 137.
9. Held, (1.) That the provisions of the act 48. Geo. III. c. 151, as to reopening against final decrees, apply to the Bill-Chamber; and, (2.) That the expenses to be paid on being so reopened, are those in the Bill-Chamber alone, and not those incurred in the Inferior Court, No. 267. p. 427.
10. A petition against an interlocutor of the Lord Ordinary on the Bills, and one by an Ordinary of the First Division, cannot be presented to the Second, No. 98. p. 118. See *Bill of Exchange*, 11.—*Hypothec*, *Writer's*, 5.

IV. ——— REDUCTION.

1. A remit to discuss reasons of reduction in the reduction-roll of the Outer House to the Lord Ordinary on the Bills, held sufficient and correct, No. 232. p. 325.
2. Held, (1.) That a sasine taken in virtue of a precept proceeding on an obligation to infeft by two manners of holding, and that either by resignation or confirmation, and the sasine not being confirmed, did not vest a real right; (2.) That although such an objection is not libelled as a ground of reduction, it is competent for the Court to entertain it, after a remit to discuss the reasons of reduction; but, (3.) That the pursuer is liable in the previous expenses, No. 213. p. 290.
3. Certain interlocutors having been pronounced by an Inferior Court in an action founding on a deed of agreement, and a reduction having been brought of these interlocutors, and of the deed, and it being objected that it was incompetent to reduce in-

## PROCESS, IV. REDUCTION.

locutors in a depending process, the Court superseded that point till the issue of the reduction of the deed, No. 201. p. 264. See *Bill of Exchange*, 13.—*Burgh Royal*, 4.—*Small Debt Act*, (*Sheriff's*).

## V. ——— SUSPENSION.

1. Bill of suspension of a decree for a sum below £12 allowed before extract, No. 10. p. 11. and No. 304. p. 462.
2. Suspension an incompetent mode of complaining of the election of a Commissioner of Police, after he has been sworn into office, and acted for some time in his official capacity, No. 202. p. 266.
3. A summary order by an Inferior Judge may be complained of by suspension during the dependence of the cause, No. 58. p. 71.
4. Held incompetent to remit a bill of suspension of a charge for expenses proceeding on a decree of absolvitor, with instructions to open up the cause on the merits, No. 115. p. 134.
5. Suspension of a decree in absence founded on a bill granted by a married woman, held competent, No. 180. p. 226.
6. Letters of suspension dismissed as incompetent, and not to be remedied by amendment, on the ground that the date of the letters was not that of the passing of the bill; and this objection held to be *pars judicis*, and not barred by its not having been stated till after considerable procedure had taken place, No. 463. p. 766. See *Infra*, VII. 4.—*Stat. 25. Geo. III. c. 5.*

## VI. ——— MULTIPLEPOINDING.

1. A claimant in a multiplepoinding having been preferred, and having received payment of the fund *in medio* from the holder, under a warrant for execution pending an appeal by a competing claimant, and on granting bond to the holder to repeat in case of a reversal—found that the judgment having been reversed, and further proceedings ordered, the competing claimant was entitled to demand consignation, although no appearance was made by the holder, to whom the bond had been granted, No. 23. p. 28.
2. An arrestment having been executed in the hands of a private trustee for behoof of creditors, as being debtor to the bankrupt *privato nomine*, and a multiplepoinding having been brought in his name *qua trustee*, this process dismissed as incompetent, No. 298. p. 450.
3. Raisers of a multiplepoinding being also mandatories of claimants, held entitled to deduct their own claims from the amount to be consigned by them, No. 424. p. 702.
4. Circumstances held sufficient to excuse the raiser of a multiplepoinding in bringing it, although not absolutely necessary, No. 423. p. 700.
5. A process of multiplepoinding dismissed, in respect intimation had not been given to the nominal pursuer, in terms of A. S. 12th Nov. 1825. No. 498. p. 822. See No. 314. p. 482.

## VII. ——— (6. GEO. IV. c. 120.)

1. Form of reclaiming notes under, No. 245. p. 340, No. 157, p. 181, and No. 162. p. 189.
2. An amendment of a summons raised prior to the above statute



PROCESS, VII. 6. GEO. IV. c. 120.

- ordered in respect it was not sufficiently positive and clear, and the pursuer subjected in the expenses thereby occasioned, No. 248. p. 352.
3. Cases ordered in causes not prepared under the Judicature Act, do not fall under the sanction of the penalties in that statute, No. 264. p. 390.—Same as to condescendences, note, p. 391.
4. Answers to letters of suspension must be returned like defences, and parties failing can only be reponed on payment of the previous expenses, exclusive of those incurred in bringing the action into Court, No. 268. p. 397.
5. Held competent for a Lord Ordinary, under the above statute, to order a summons containing a great deal of superfluous matter to be amended, by striking out what is superfluous, No. 329. p. 506.
6. A claimant in a multiplepoinding having, prior to the above statute, lodged his claim, which was appointed to be seen, and a general order for condescendences by the claimants having been thereafter issued, held that he was not liable in expenses for not lodging a condescendence, No. 342. p. 526.
7. Held incompetent to award expenses relative to a dilatory defence which had been repelled, and no notice given of an intention to bring it under review, No. 343. p. 527.
8. An application having been refused by a Sheriff for a warrant to apprehend a party as in *meditatione fugæ*, and a bill of advocacy having been presented,—Held, (1.) That the bill must be passed; and, (2.) That the remedy of the complainer was to apply to the Sheriff to regulate interim possession, in virtue of the 42d section of the above statute, No. 258. p. 390.
9. The Court, in an advocacy brought under review of the Court by a reclaiming note, refused to grant an order for printing a proof taken in the Inferior Court, in respect it did not form part of the record; but their Lordships allowed it to be printed by the party wishing to found on it, No. 446. p. 748.
10. Incompetent to reclaim against an interlocutor of the Lord Ordinary, refusing as incompetent a bill of advocacy of an interlocutory judgment of an Inferior Court, allowing an oath in supplement of an action of filiation, No. 469. p. 774.
11. A party reponed without expenses against a decree pronounced in respect of his failure to lodge a condescendence, this having been occasioned by the fault of his opponent, No. 454. p. 755.
12. In the case of *Fraser v. M'Kenzie*, 10th June, the Court refused to receive notes of pleas in law containing argument, and declared they would strictly enforce the statute, which requires that they shall be 'short and concise,' and 'without argument,' Note, p. 699.
13. Action allowed to be abandoned, with reservation to bring a new action, No. 504. p. 830.
14. Judgment of Lord Ordinary recalled in respect pronounced before record made up, No. 503. p. 829.
15. Held that the expenses payable on being reponed against a de-

## PROCESS, VII. 6. Geo. IV. c. 120.

does in absence do not include the expense of the summons, No. 238. See *Proof*, V. 5. *Infra*, IX. 2. See also p. 453, Note.

## VIII. —, (Stat. 48. GEO. III. c. 151.)

1. A party allowed to be reponed, under the 48. Geo. III. c. 151, against an interlocutor in his own favour to a certain extent, and which had become final by mistake, No. 265. p. 391.
2. A party entitled to object to an application under the above statute to be reponed against a final interlocutor, that it did not become so through inadvertency, although he have not reclaimed against the interlocutor of the Lord Ordinary allowing the application to be made, No. 494. p. 815. See *Supra*, III. 9.

## IX. —, UNDER SEQUESTRATION STATUTE.

1. A complaint to prevent a trustee acting on a resolution of a meeting of creditors, alleged not to have been carried by an actual majority, and directed solely against the trustee, dismissed as incompetent, No. 246. p. 349.
2. Held, (1.) That a petition and complaint by a trustee against commissioners was objectionable on account of the vagueness of the charge, and the want of a specific prayer; (2.) That a Lord Ordinary to whom the complaint has been remitted in terms of the act of sederunt, 12th November 1825, may dismiss it on such grounds, without having made up any record; and, (3.) That such complaint falls within the spirit of the 26th section of the act of sederunt, No. 270. p. 400.
3. Question raised, but not decided, whether it is competent to reclaim against an interlocutor of the Lord Ordinary on the Bills, approving of a composition under the bankrupt act, No. 428. p. 707.
4. Held incompetent to remit a petition for approval of composition and discharge of a bankrupt under sequestration to the Lord Ordinary on the Bills during vacation, where the second meeting of the creditors for agreeing to the composition had not taken place, No. 487. p. 808.
5. Or although accepted by the creditors at the second statutory meeting, where the requisite concurrence had not been obtained and reported, No. 490. p. 811. See *Supra*, I. 1. 15.—*Sequestration*, 6. 14. 23. 24.—*Records of Court*.

X. —, SUMMONS. See *Bill of Exchange*, 7.—*Burgh Royal*, 6.—*Expenses*, I. 5, 6.—*Jurisdiction*, 5.—*Supra*, I. 13. VII. 2. 5.

PROMISE.—Circumstances in which a letter by a landlord, promising to a party the first and last offer of a farm, not binding so as to compel him to let the farm, or subject him in damages, No. 28. p. 33.

PROOF, I. BY COMMISSION.—A commission to take a proof in Aithrica having been granted in terms too general, the Court made it more specific, No. 381. p. 613.

## II. — TO LIE IN RETENTIS.

1. An application for the examination of aged witnesses to lie in retentis, granted in a process depending before the Lord Ord-

**PROOF, II. TO LIE IN RETENTIS.**

1. nary; but observed that the correct form was to apply to the Ordinary, No. 71. p. 87.
2. Old witnesses allowed to be examined, and their evidence to lie in *retentis*, although the summons had not been called when the application was made, No. 79. p. 98.

**III. ——— WITNESS.**

1. Two declarators of marriage having been raised by different parties against the same woman, and conjoined; and she having, by her conduct in the cause, identified herself with one of the pursuers—Held, (1.) That her brother and sister were not admissible as witnesses on his behalf, and that he could not found on her judicial declaration; (2.) That the party was not barred from pleading these objections because they did not appear on the record, which merely stated that objections were taken as on a paper apart, no such paper having been lodged, No. 320. p. 490.
2. An offer to prove by the agent of a bank, to whom, in his private capacity, an accommodation bill had been granted, originally expressing the value as 'in account,' but to which was afterwards added, 'for business,' held inadmissible, No. 187. p. 231. See *Small debt Act—Supplement, Letters of—Submission*, 5.

**IV. ——— OATH IN SUPPLEMENT.**—Held that a pursuer is entitled by his oath to supply a defect in evidence arising from the suspicious disappearance of a book in the custody of the defender, No. 237. p. 331. See *Bastard*, 3. 7.

**V. ——— REFERENCE TO OATH.**

1. The acceptor of a bill drawn by his brother, having been charged by a creditor of the latter, who had taken up the bill after it was past due, presented a bill of suspension, in which he offered to prove no value by his brother's oath: but in the course of the litigation, the brother having been rendered infamous by conviction of a crime, the Court refused to allow the reference to his oath, No. 349. p. 534.
2. Circumstances in which it was held incompetent to refer to the oath of a party, after a judgment of the House of Lords, in a case involving a question of intention of a testator, but sustained in respect of the consent of parties, No. 271. p. 402.
3. Held that claims on bills and open accounts made in a ranking and sale brought by an apparent heir of his ancestor's estate, but which were prescribed, could not be proved by the oath of the heir, who was in pupillarity at the time of his ancestor's death, and was still minor, No. 285. p. 424.
4. Held, (1.) That the holder of a fund in a forthcoming is entitled to prove counter claims by the common debtor's oath, in a question with the arrestee, No. 425. p. 702.
5. Reference to oath held competent before the Lord Ordinary, notwithstanding the finality of his interlocutor by the 6. Geo. IV. c. 120. No. 473. p. 781.

**VI. ——— WRIT.**

1. (1.) Whether a contract of marriage executed in the Scottish form

**PROOF, VI. WRIT.**

in England, consisting of three sheets, but signed on the last page only, be probative; (2.) Whether the objection removed by the marriage having taken place on the faith of it, No. 93. p. 110.

2. Held to be a valid ground of reduction of a deed, that one of the instrumentary witnesses neither saw the grantor subscribe, nor heard him acknowledge his subscription, although there is no allegation that the deed is false, No. 241. p. 325. See *Composition Contract*, 1.

**VII. — PAROLE.**—See *Insurance*, 2.—*Jurisdiction*, 2.

**VIII. — VERDICT.**—After a verdict, the judicial admissions of a party cannot be founded on, No. 74. p. 92. See *Testament*, 1.

**PROPERTY.**

1. A proprietor held liable for damage sustained by his neighbour, in consequence of operations on his own property, No. 4. p. 6.
2. A proprietor of the sunk and street flats of a house is entitled to convert them into shops, although this is resisted by the proprietors of the upper flat,—persons of skill reporting that the alterations can be made with perfect safety, and without reasonable apprehension of danger, No. 86. p. 104.
3. Held that a proprietor on the banks of a river is entitled to erect a bulwark on his own ground for the protection of his property, although it is alleged that it will be productive of damage to an heritor on the opposite bank, by causing the river in floods to overflow his land, No. 474. p. 783.
4. A party having, without judicial authority, made certain alterations on a tenement, of which the under floor belonged to him, and the upper to another, whereby the latter was injured and endangered, the Court ordered the premises to be restored to a state of absolute security, without regard to the expense, No. 357. p. 546. See *Dean of Guild—Gable*.

**PROVING THE TENOR.**—The Court refused, *hoc statu*, to allow a proving of the tenor of a bill of exchange, No. 332. p. 500.

**PROVISION TO CHILDREN.**—Whether a provision to children by a conveyance to trustees confers a *jus crediti*, or only a *spes successionis*, No. 93. p. 110. See *Competition*, 1.—*Fee and Lifrent*, 1. 2. Stat. 1621. c. 18.

**PUBLIC OFFICER.**—A complaint against a baron bailie, for receiving payment of expenses awarded by him, sustained, and expenses found due, No. 216. p. 297. See *Process*, 1. 4.

**PUBLIC RIVER.**—Held that an heritor who had fenced his lands for buildings was entitled to discharge the sewage water into a neighbouring public river, and that the inferior heritors could not object to this as a nuisance, or as depriving them of the use of the water; but that this was to be done in the manner least offensive or injurious to them, No. 145. p. 167.

**RECORDS OF COURT.**—The Court, of consent of creditors, rectified the designation of a bankrupt in an award of sequestration, No. 468. p. 774. See *Process*, 1. 18.

**REDUCTION.** See *Process*, IV.—*Fraud—Testament—Bankrupt*, 1. 8. 7. 8.

**REGISTER-HOUSE.**—Held that the General Register-House is not liable to police assessment, No. 374. p. 586.

**REGISTERED SHIP-OWNERS' LIABILITY.**—Circumstances in which registered ship-owners were held not liable for a furnishing ordered by a party in possession of the vessel on an equitable but temporary title, the furnishing not having been *in rem* *consum*, No. 269. p. 898.

**RES INTERVENTUS.**—See *Proof*, VI. 1.

**RELIEF.**—The proprietor of a house which was in the course of building, having been found liable in damages for an injury suffered by a woman in consequence of an insufficient fence, held entitled to relief from the builder, in terms of a contract, No. 102. p. 122. See *Process*, I. 13.—*Cautioner*, 1, 6.

**REMOVING.**—See *Landlord and Tenant*, 5. 6. 9. 13. 14. 15.—*Process*, II. 2.

**RENUNCIATION BY HEIR.**—See *Deathbed*.

#### REPARATION.

1. Circumstances in which it was held that a landlord was not liable in damages to a tenant for ejecting him and his family at a time when it was alleged he had also the tenant's effects attached by sequestration, No. 170. p. 208.

2. Circumstances under which a person, who by his conduct had created a belief that he was intending marriage, and seduced the woman, was found liable in damages, No. 339. p. 520.

3. Held that an averment, that an arrestment on the dependence of an action; and a warrant to apprehend as in *mediatione fuge*, were illegal, nimium, and oppressive, was not relevant, malice not being alleged, and the action having in part been decided against the party, No. 16. p. 22.

4. Claim of damages by an inferior tenant on a stream against a superior tenant, for not sending down water agreeably to what was ultimately determined by the Court to be the true construction of the obligations in his lease, held relevant, although the inferior tenant had at one time put the same construction on the lease as that on which the superior tenant acted, No. 367. p. 571.

5. Circumstances in which the owners of a vessel lying aground having been injured by the collision of another vessel passing her, were held not entitled to reparation of the damage thereby occasioned, No. 435. p. 719.

6. Circumstances in which it was held, that a party acting as agent for the seller of certain entailed lands sold under the stat. 42. Geo. III. c. 116, for redemption of the land tax, and who also acted as trustee in terms of that statute, was not liable to indemnify the purchaser on the sale being set aside as irregular; reserving to the purchaser to claim repetition of the price, No. 441. p. 732. See *Agent and Client*, 9. 10. 11.—*Property*, 1.—*Entail*, 1. 2. 4.—*Master and Servant*, 4.—*Slander*.

#### RES JUDICATA.

1. A party having raised an action, partly criminal and partly civil, before a Sheriff, and decree being pronounced both for fine and damages, and the decree having been reversed by the Court of Justiciary in respect of irregularities—Held that this afforded to the defenders a sufficient defence against a new action of damages, No. 205. p. 272.

**RES JUDICATA.**

2. Whether absolutor from an action of damages before the Bailies for breach of promise of marriage, forms a *res judicata*, so as to bar an action of damages for seduction before the Commissaries, No. 6. p. 8.
3. Judgment having been pronounced by an American Court, finding the fee of certain sums to belong to the pursuer under a settlement of her brother, executed in America, decree was pronounced conformably in her favour, No. 35. p. 42.
4. Whether a judgment in a suspension, *res judicata* in a reduction, as to the same legal pleas, No. 117. p. 137. See *Landlord and Tenant*, 9. *Process*, II. 1.

**REPETITION.**—A party in possession of two entailed estates, with different destinations, having sold a farm of one for redemption of the land-tax of both, and purchased it in fee-simple for his own behoof, his representatives found liable, on the sale being reduced, to repeat the rents of the farm, and entitled, on the other hand, to repayment from the heir of one of the estates of the redemption-money and expenses of the sale, affecting to that estate, No. 45. p. 56.

**RES INTER ALIOS ACTA.**—A pursuer in an alternative summons against two defenders held bound by a verdict in a trial between the defenders, he having acquiesced in that mode of determining the cause, No. 172. p. 212.

**RESTITUTION.**—A party having, by his deed of settlement, conveyed his estates in trust, *inter alia*, for the purpose of entailing his lands on his eldest son and a series of substitutes, and for payment of debts and legacies; and the eldest son having taken possession on his appearance, and expended large sums on the estate, and the trustees not having executed the entail till a subsequent period—Held, (1.) That the son had no claim against them for the expenses of the improvements, or to make three-fourths of them a burden on the estate in terms of the above statute; but, (2.) That he was entitled to relief of sums paid in implement of an obligation of the truster for building a farm-steading; and of sums advanced in consequence of a bequest or recommendation to retain an overseer in his situation during the rest of his life, No. 477. p. 788.

**RIVER.**—See *Property*, 3.—*Public River*.

**ROAD.**

1. Unwarranted obstructions placed by trustees to shut up a public road may be removed *brevis manu* by parties having interest, if done *de recenti*, but not after a lapse of time, No. 220. p. 303.
2. Held incompetent under the statute, 4. Geo. IV. c. 49, after the lapse of six months, to review by reduction a decree of Justices of the Peace pronounced under a local statute, No. 480. p. 695.
3. Held that part of an old parish road, intersected by a new turnpike road, having been assumed and kept in repair by the trustees of the turnpike road in virtue of their powers under a local act, must be held to be turnpike, to the effect that carriages, &c. going 100 yards along it, and merely crossing the turnpike road, may be subjected to toll, notwithstanding the clause of exemption in the

**ROAD.**

general road act, in the same way as if they had travelled along the turnpike road itself, No. 458. p. 759.

4. There being a prohibition in a local act against buildings within 90 feet, held that a clause in the general road act prohibiting buildings within 25 feet of the centre of the road did not repeal or supersede, but that it was still effectual to prevent buildings within the 90 feet, No. 507. p. 834. See *Royal Park—Title to Pursue*, 5.

**ROYAL PREROGATIVE.**—Held, (1.) That the right of printing Bibles, and of prohibiting their importation, belongs exclusively to the King as part of the royal prerogative in Scotland; and, (2.) That a commission to printers to print Bibles, and prohibiting the importation of them, '*a quibusvis locis transmarinis*,' entitles them to prohibit importation from England, No. 365. p. 559.

**ROYAL PARK.**—Road Trustees interdicted from quarrying within the Royal Park of Holyrood, No. 505. p. 830.

**SALE.**

1. An assignation of a lease in security having been granted with a declaration that it should become absolute on failure to repay the money advanced, and on payment by the assignee of the balance of an agreed on price—Held that no declarator of forfeiture of the right of redemption was necessary to make the conveyance absolute; and observed, that the Magistrates of burghs have no jurisdiction in such declarators, or as to a conclusion to cancel documents, No. 385. p. 617.
2. Circumstances in which an illiquid claim of damages from misdirection of a parcel containing goods, and not brought forward till a late period of an action for payment, repelled as a ground for retention of the price, No. 260. p. 383.
3. Held that a sale made by an heritable creditor under a power of sale, and who acted as auctioneer, and caused the subjects to be bought for his own behoof, was unlawful, No. 436. p. 722.
4. (1.) One of two trustees under a voluntary trust-deed for payment of creditors, not entitled to object to a sale of part of the trust-property, on the ground that he had not interposed his consent, he having at a meeting where the property was sold, offered a less price than the actual purchaser, and having insisted that the lands had been sold to him at that price; and, (2.) A general offer for lands, to which a right of pasturage in a common was attached, held to include that right, No. 284. p. 422.
5. Circumstances under which a party who had employed another to purchase horses, and who alleged that his instructions had not been duly complied with, was found not entitled to return them, No. 415. p. 685.
6. An allegation that malt had been sold for ready money, found barred by the seller having received a bill, and made no objection to it for nearly three weeks thereafter, No. 2. p. 4.
7. Circumstances under which a purchaser of an estate at a judicial sale was held bound, although there was a defective title, No. 29. p. 34. See *Stat. 42. Ges. III. c. 116.—Heritable Creditor*, 1. 2.—*Sequestration*, 3. 10. 13.

**SALMON FISHING.**—See *Fishing*.

**SASINE.**

1. Held, (1.) That the omission in the notary's docquet to state that he was present with the witnesses, is fatal to the sasine; (2.) That mere bad grammar is not a good objection, if the meaning is plain; and, (3.) That a sasine by an heritable creditor, after the purchaser in a ranking and sale has been infeft, is inept, No. 163. p. 190.
2. Held that a sasine taken in virtue of a precept proceeding on an obligation to infeft by two manners of holding, and that either by resignation or confirmation, and the sasine not being confirmed, did not vest a real right, No. 213. p. 290. See *Service*, 2.

**SCHOOLMASTER.**—The Directors of an Academy found entitled to dismiss the rector on cause shown, No. 51. p. 63. See *Jurisdiction*, 2.3.

**SEDUCTION.** See *Reparation*, 2.—*Res Judicata*, 2.

**SECURITY, RIGHT IN.**—A father having left his estate to trustees, to be conveyed to his eldest son, on condition of his paying £ 10,000, and he having taken possession, and made up titles to a part as heir, and having thereafter died bankrupt; found that the trustees who had received a partial payment out of that part which remained in *hereditate jacente* of the father, and which they afterwards vested in themselves, were entitled to rank *pari passu* for the whole debt on that part to which the eldest son had completed his titles, to the effect of getting full payment, No. 13. p. 16.

**SEQUESTRATION UNDER BANKRUPT STATUTE.**

1. (1.) A party is not entitled to the character of a creditor, to the effect of applying for a recall of a sequestration, the ground of debt being a decree for expenses which had been issued, not in his, but in his agent's name, who had done diligence on it; (2.) A reversal of a sentence of outlawry, which had not been followed by denunciation, has a retrospective effect, so as to validate a concurrence as a creditor to an application for sequestration, No. 104. p. 124.
2. Held that a bankrupt under sequestration, who pursues an action, must either sist his trustee, or find caution for expenses, No. 259. p. 381.
3. Circumstances in which a sale of the outstanding debts of a sequestrated estate, in accomplishing which the statute had not been strictly observed, was sustained, No. 294. p. 442.
4. Circumstances in which a discharge to a bankrupt was opposed on the ground of fraud, but granted, no relevant charge being specified, No. 88. p. 106.
5. Circumstances in which it was held, (1.) That before paying any dividends out of a sequestrated estate, the trustee was bound to inquire into the nature of an agreement entered into by some of the creditors, and one of the commissioners, to purchase the heritable property of the bankrupt, and the debts due by him; and, (2.) That an objection to the title of the complainer, that it was founded, on a bill which was acquired by him after it was dishonoured, and that he was therefore liable to objections affecting it as in the hands of the drawer, was no bar to such inquiry, No. 199. p. 259.



**SEQUESTRATION UNDER BANKRUPT STATUTE.**

6. Held competent for creditors to complain to the Court that a trustee on a bankrupt estate had refused to examine a party alleged to have intromitted with it, and to re-examine the bankrupt on matters therewith connected, and to have the trustee ordained to do so, No. 225. p. 312.
7. A party preferred as interim factor on a sequestrated estate, in respect of a majority of real votes, No. 105. p. 125.
8. A party elected interim factor by a majority of votes, not entitled to take forcible possession, without order of law, of the bankrupt's books and papers, being in the knowledge that his election is to be challenged, No. 106. p. 126.
9. Whether an oath as to a debt being just, according 'to the best of deponent's knowledge and belief,' be sufficient to support a claim on a sequestrated estate, No. 110. p. 131.
10. Held, (1.) That the concurrence of four-fifths of creditors present was sufficient to authorize the sale of outstanding debts due to a sequestrated estate; (2.) That the acceptance by a trustee of too high a commission, and not lodging sederunt-book in due time, are not sufficient grounds for refusing his discharge; and, (3.) Observed that a commission of 25 per cent. on the funds recovered is too large an allowance to a trustee, No. 129. p. 151.
11. Circumstances in which a complaint against a party acting as clerk of a sequestration, for having concurred in an application for a protection to the bankrupt, was dismissed, No. 131. p. 153.
12. Held, (1.) That it is not a relevant objection to a vote for a trustee that the claim is suspicious, and that, on investigation, it will be found false and fictitious, the requisites of the statute being complied with; and, (2.) That neither is it relevant to allege that the voter has an interest adverse to the other creditors, No. 132. p. 154.
13. Held, (1.) That heritable property conveyed to a trustee under the bankrupt act can only be sold under the burden of the securities over it; (2.) That a purchaser is not relieved from them by paying the price to the trustee; and, (3.) That an heritable creditor is not liable for any part of the expenses of a sequestration, nor of the sale of the heritable property, where the sale is not beneficial to the creditor, No. 188. p. 232.
14. Competent for a trustee to apply, by incidental petition to the Court, for warrant against a person who had been agent in the sequestration, for delivery of the titles and papers of the bankrupt estate; and the agent not entitled to retain them, if his claim of hypothec is reserved preferably on the estate, No. 282. p. 420.
15. A creditor who has obtained decree for expenses in a litigation with the trustee on a sequestrated estate, is entitled to his dividends, without any part of the expenses on either side being deducted, No. 193. p. 241.
16. Held, (1.) That a commissioner on a sequestrated estate is entitled to call a meeting of the creditors to remove a trustee; and,

## SEQUESTRATION UNDER BANKRUPT STATUTE.

- (3.) That a majority of such a meeting may remove the trustee without assigning cause, No. 194. p. 242.
17. Warrant granted to examine a bankrupt residing in Prussia, No. 236. p. 331.
18. A wife entitled to payment of a dividend out of her divorced husband's sequestrated estate for provisions in her contract of marriage, on granting such deeds as should be necessary to enable the trustee to recover a share, to which her husband had been found entitled, of certain funds in Chancery to which she had succeeded, No. 309. p. 474.
19. Penal interest on sums in the hands of a trustee on a sequestrated estate ceases to run from the date of his removal, No. 315. p. 482.
20. Held that a resolution of the commissioners on a sequestrated estate, awarding to a trustee who had been removed from his office a recompense for his trouble, must be brought under the consideration of a general meeting of the creditors, before a complaint to the Court is competent, No. 331. p. 509.
21. Question raised, but not decided, as to the rate at which the wife of a bankrupt was to be ranked, who had right to an annuity of £200 on her surviving him, and to be restricted to £100 in the event of her second marriage, No. 332. p. 513.
22. Circumstances in which an interim factor not allowed to retain the sequestrated effects till repaid his advances, No. 60. p. 72.
23. (1.) Trustee removed for deviation from the statute, particularly § 46. (2.) Competent for creditors, though contingent, to apply for removal of a trustee under that section, No. 108. p. 120.
24. Held incompetent to apply simply for removal of commissioners, and without libelling the section of the statute founded on, No. 101. p. 121.
25. An allegation that a creditor held an interest adverse to the other creditors, not relevant to prevent him from voting for a trustee, No. 103. p. 123.
26. A petition refused for recall of a sequestration, after the lapse of sixty days, on the allegation that it had been applied for by the petitioning creditor under the influence of error, and that a majority of the creditors were desirous to have it recalled, No. 289. p. 625.
27. Held that a bankrupt under sequestration is entitled to be discharged, on the Court being satisfied that he has the requisite concurrence, although the trustee has refused to grant a certificate to that effect; and although he had stated objections to the regularity of the affidavits and claims of creditors concurring, No. 506. p. 697. See *Bankrupt, 5. - effects, 13.*

## SEQUESTRATION OF LANDS.

1. Held incompetent to sequester lands, the debtors' debts over which did not nearly exhaust them, and there being no compulsion, No. 124. p. 184.
2. The Court refused a petition for sequestering a share of the ge-

**SEQUESTRATION OF LANDS.**

real property of a party deceased left by a deed of settlement, as not sufficiently precise, No. 455. p. 756.

**SERVITUDE.**

1. Circumstances in which it was held that a superior who had fettered land for villas, was not barred from erecting buildings which tended to prevent the feuars from having extensive views from their windows, on the faith of which they alleged they had contracted, No. 21. p. 28.
2. (1.) Feuars in the New Town of Edinburgh, on the faith of a contract and articles of roup made by the superiors, limiting the height of the houses, entitled to enforce the restriction; (2.) An effectual servitude, *altius non tollendi*, thereby created; and, (3.) A vassal entitled to withhold his feu-duties from the superior till the servitude enforced, No. 109. p. 133.
3. Circumstances in which a party was found entitled to build to a greater height than was allowed by his title-deeds, No. 125. p. 148.
4. Where a servitude is expressly defined in titles, the proprietor of the servient tenement is not entitled to contravene the restrictions, on the ground that he is permitted to do something else more injurious to the dominant tenement, No. 167. p. 160.
5. Held that a right of shealing or pasturing cattle, having been conveyed by dispositive words, did not imply a right of property, No. 165. p. 197.
1. The Court refused to reduce a service obtained in a competition, the allegation being, that there was no sufficient evidence led before the inquest that the party's ancestor, bearing the same name and general designation 'of a Major in the kingdom of Ireland,' was truly the substitute called in the deed of entail, in respect the pursuer failed to establish the existence of any other person to whom the designation in the entail could apply, No. 442. p. 734.
2. A party having disposed lands to his wife in conjunct liferent, and 'to the heirs of my body of my present or any future marriage in fee, whom failing,' to A. B. *nominatim*; and the disposer having died without issue, and A. B. having thereupon executed the precept and taken infeftment without service—held that his title was inept, No. 446. p. 742.

**SETTLED ACCOUNT.**—See *Agent and Client*, 2. 6.

**SINGULAR SUCCESSOR.**—See *Stat. 42. Geo. III. c. 116.*—*Superior and Vassal*, 1.

**SLANDER.**

1. Expressions of a defamatory nature, used hastily in the heat of passion, held not actionable, No. 2. p. 5.
2. A summons averring that certain calumnious statements made judicially by a procurator, were done so maliciously, remitted simpliciter to the Jury Court, No. 206. p. 275.
3. Held that a Professor of an University, against whom, in his public capacity, certain observations of an injurious nature had been made to the Patrons, was not entitled to retaliate by using expressions of a libellous nature in his public lectures, and in speeches which he addressed to the *Senatus Academicus*, and by

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printing and publishing them, and persevering in this course for a length of time, No. 280. p. 414. See *Lic alibi pendens*.

**SMALL DEBT ACT, (JUSTICES.)**

1. Found that it was a sufficient objection to a decree of the Justices under the Small Debt Act, that the witnesses had not been put on oath, No. 23. p. 30.
2. Action for payment of a quarter's aliment to a bastard child, though less than £ 5, the paternity not being established incompetent under, No. 449. p. 748.

— (SHERIFF'S).—Held that in processes under this act, when a pursuer intends to resort to the declaration or oath of the defender, he must intimate this as a 'mean of proof,' and the omission to do so held to render a reduction of the decree in such process competent, and a sufficient ground of reduction, No. 479. p. 793.

**SOCIETY.**

1. Held that the members of a religious association were not bound to pay the stipend of the minister whom they had appointed, longer than they adhered to the congregation, No. 69. p. 84.
2. Circumstances in which property purchased by partners in a joint adventure, and used for the purpose of the concern, held not to be company property, No. 253. p. 361. See *Partnership*. Also No. 30. p. 37.

STAT. 1621. c. 18.—Provisions to a wife and children, of an adequate nature, made by a person who was at the time solvent, sustained, No. 27. p. 32. See *Bankrupt*, 4.

— 1696, c. 5.—See *Bankrupt*, 1, 6, 7, 8.—*Heritable Creditor*, 3.

— 10. GEO. III. c. 51.—See *Entail*, 1.—*Restitution*.

— 25. GEO. III. c. 51.—A bill of suspension of a conviction under the above statute, relative to the post-horse duties, refused as incompetent, No. 296. p. 447.

— 42. GEO. III. c. 116.—Circumstances in which it was held, (1.) That a sale of part of an entailed estate for redemption of the land-tax was illegal; (2.) That a singular successor infeft could not be affected by the fraud of his author; and, (3.) That although the next heir substitute in an entail was minor, it was competent, under the above statute, to sell part of the estate for redemption of the land-tax, provided due intimation be made to the next substitute heir who is of lawful age, No. 289. p. 429.

— 43. GEO. III. c. 54.—See *Jurisdiction*, 2, 3.

— 50. GEO. III. c. 112.—See *College of Justice*.

— 4. GEO. IV. c. 26.—See *Stat.* 25. *GEO. III. c. 51*.

— 4. GEO. IV. c. 49.—See *Road*.

— 4. GEO. IV. c. 94.—See *Thirlage*.

— 6. GEO. IV. c. 62.—Circumstances in which it was held that incarcerating creditors are not entitled to insist on their debtor being examined on oath, to discover his funds, relative to the disposition *omission bonorum* required by the above statute, as a condition of aliment under the Act of Grace, No. 278. p. 411.

— 6. GEO. IV. c. 120.—See *Process*, VII.

**SUBMISSION.**

1. A submission having been made to five persons, with power to

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the majority to pronounce judgment in case of variance of opinion, and after several proceedings had taken place, two of the arbiters having resigned, found that a decree by the other three was effectual, No. 44. p. 58.

2. A decree-arbitral signed by two of three arbiters held good, No. 58. p. 66.
3. Held, (1.) That it is competent to refer to notes of an arbiter in a submission, who has only decided part of the claims submitted to him, to ascertain what points he has actually determined; (2.) That a widow is entitled to compensation from the heir for part of lands sold prior to the fixing of her terce lands, No. 210. p. 266.
4. Parties in a submission are liable for the expense of employing an accountant to whom the arbiter has remitted books, &c. to draw out a state of accounts, No. 285. p. 390.
5. Application for authority to cite havers and witnesses to appear before an arbiter must be made by petition to the Court of Session or Judge Ordinary, and not in the Bill-Chamber, for letters of supplement, No. 488. p. 609. See *Judicial References*.

**SUCCESSION.**—The destination in the dispositive clause and obligation to infest in a deed of entail, being to the institute, and the ‘ heirs male of his body;’ whom failing, the ‘ other heirs, &c. after specified;’ but in the procuratory, which contained the whole nomination of heirs, and provisions of entail, and which was stated to be for effectuating the above infestment, the destination being to the heirs generally of the institute’s body; whom failing, to certain substitutes and their heirs male. Held, (1.)—That the dispositive was the controlling clause; and, (2.) That an heir male of a posterior substitute took before an heir female of the body of the institute, No. 501. p. 824.

———, (MOVEABLE.)—A lady domiciled in Scotland having died possessed of funds in England, and being succeeded by her children resident in this country, who died without having expedite confirmation—Held that the funds were vested in them *ipso jure*, according to the law of England, so as to be transmissible to their executors, in preference to the nearest of kin to their mother, No. 290. p. 432. See *Heritable and Moveable*, 1. 2.

**SUMMARY WARRANT.**—See *Master and Servant*, 2. 3.—*Process*, V. 3. —*Dean of Guild*.

——— **APPLICATION.**—See *Execution pending Appeal*, 3.—*Agent and Client*, 5.—*Process*, I. 18.—*Sequestration*, 14.

——— **COMPLAINT.** See *Process*, I. 4. IX.

**SUMMONS.**—See *Bill of Exchange*, 7.—*Burgh Royal*, 6.—*Expenses*, I. 5. 6.—*Process*, I. 19. VII. 2. 5.

**SUPERIOR AND VASSAL.**

1. In calculating the year’s rent to be paid to the superior for entry of a singular successor, the vassal is entitled to deduct a fifth of the rent as teind, notwithstanding the existence of a decree of valuation, No. 179. p. 224.
2. Held that a vassal is entitled to object to the liferent of the su-

## SUPERIOR AND VASSAL.

priority of his lands being split, and conveyed to two different parties, No. 383. p. 615. See *Scrutiny*, 1. 2.

SUPPLEMENT, LETTERS OF.—Letters granted by this Court in supplement of letters of second diligence by a Sheriff of one county to force comparance of a witness resident in another county, No. 384. p. 617.—See *Submission*, 5.

SUSPENSION.—See *Process*, V.

TACK.—See *Landlord and Tenant*.

TAX.—See *Clause*, 2.

TEINDS.—Entries in an old rental-book of payments of a specified amount of teind-duty held sufficient evidence of a *modus*, according to which the titular was entitled to enforce payment of arrears, No. 378. p. 603. See *Superior and Vassal*, 1.

TERCE.—Held, in a question with a singular successor, that a widow who had never served to her terce could not transmit to her executor the right to demand her share of the rents, No. 317. p. 485. See *Submission*, 3.

## TESTAMENT.

1. A party having, as ascertained by the verdict of a Jury, required back her will for the purpose of cancelling it, and being prevented from so doing by unintentional delay to return it.—Held, (1.) That this affords no relevant ground of reduction; and, (2.) That the Court, in applying the verdict, are not entitled to take into consideration evidence laid before the Jury, and which did not appear on the face of it, No. 230. p. 323.

2. Deeds of settlement reduced, which were made by a person capable of disposing of her estate, but incapable of judging correctly of the effect of the deeds in question, and as not being her voluntary acts, though not obtained by undue influence of the parties in whose favour they were granted, No. 167. p. 200. See *Legacy—Marriage-Contract*.

THIRLAGE.—Held, (1.) That a subtasksman of maultures was entitled to pursue an action to have it found that he had right to them, and to decree for those which had been abstracted; and, (2.) That the statute 4. Geo. IV. c. 94. does not affect the interests of parties having right to such maultures, No. 242. p. 268.

## TITLE TO PURSUE.

1. A bankrupt found entitled, after a discharge under a composition-contract, to pursue an action of reduction and spuilzie, (which had been instituted by his trustee,) without any express assignation, No. 31. p. 36.

2. Held that trustees for behoof of the creditors of a tenant, under a tack including assignees, are entitled to pursue a suspension of a decree of irritancy of the tack, so as to preserve their right to claims due to the tenant for meliorations, &c. at the end of the lease, No. 185. p. 229.

3. The trustee on the sequestrated estate of a divorced husband, who, by contract of marriage, had right to the liferent of his wife's *acquiritenda*, having, subsequent to the date of the decree of divorce, raised an action of reduction, *ex capite leri*, of a settle-

TITLE TO PURSUE.

- ment of his wife's uncle, which excluded his *jus mariti*.—Held that the settlement, while unreduced, was a good title of possession, and that the wife was *in bona fide* to consume the fruits; and that such being the case, he had no interest to pursue the reduction, the liferent having fallen by the divorce, No. 308. p. 473.
4. Held that a tenant who had right to the game on his lands, and to appoint gamekeepers, was entitled to insist in a suspension and interdict against a party shooting on the lands, although his lease had been reduced by the Court of Session; but the judgment was under appeal, and he was still in possession, No. 459. p. 761.
5. A committee of trustees under a local statute found entitled to pursue an action, No. 399. p. 651.—See *Bankrupt*, 3.—*Bastard*, 1.—*Entail*, 8.—*Jurisdiction*, 4.—*Landlord and Tenant*, 13.—*Mortification*.—*Pactum Illicitum*.—*Sequestration*, 2. 5.—*Thirlage-Trust*, 3.

TRUST.

1. Circumstances in which a conveyance of lands to trustees for behoof of a contingent heir, held to carry the rents of the lands for behoof of such heir, when he should exist, during the period while there was no heir entitled to demand of the trustees to denude, No. 303. p. 460.
2. A party having, by a deed of settlement, conveyed his funds and interest thereof to trustees to purchase lands in three particular counties, and to annex them to his entailed estate, and the greater part of the funds having, within three years from the death of the truster, been so employed.—Held, (1.) That the heir of entail had no right to the interest of the heritable sum; and, (2.) That there had been no such undue delay as to entitle him to demand payment of it, even supposing he had a title to make such a demand, No. 316. p. 483.
3. A party having conveyed, *inter alia*, a right of action to trustees, but not to their heirs, and the truster being dead, and the trust having fallen by the death of the trustees, and a creditor of the parties having the chief beneficial interest under the trust (one of whom was confirmed executor *qua* nearest of the truster) having adjudged their right.—Held that the creditor was entitled to pursue the action, No. 392. p. 629.
4. A party having granted an alimentary annuity in trust for his brother, not entitled to retain the annuity in compensation of sums advanced to the brother by himself, No. 47. p. 747.
5. The Court declined to nominate a trustee on the decease of one appointed by a private trust-deed, and who had been infert in the trust-property, but whose heirs refused to act. They, however, appointed a factor, with power to take the necessary steps for investing himself with the trust-property, No. 482. p. 801. See *Adjudication—Compensation*, 1. 4.—*Expenses*, IV. 4.—*Heritable and Moveable*, 1. 2.—*Testament*, 5.—*Implied Obligation*, 2.

TRUSTEE.—See *Sequestration—Bankrupt—Sale*, 4.—*Provision to Children*.

TUTOR.—See *Freehold Qualification*, 4.

TURPIS CAUSA.—See *Discharge*.

URBAN TENEMENT.—See *Landlord and Tenant*, 3. 12.

USURY.—Held, (1.) That an annuity of £ 55 : 11 : 6 having been sold for £ 450, and the principal insured on the life of the annuitant, who was 23 years of age, was not usurious. (2.) That an assignment of that annuity by the annuitant, who was a married woman, was not objectionable, as being a personal contract, her husband's *jus mariti* being excluded; and, (3.) That she was barred, in the circumstances, from objecting that it was not ratified, No. 262. p. 388. See *Interest, (Compound)*, 1.

VALUATION.—Decree of division of *cumulo* valuation reduced, as pronounced without evidence of the extent of the parcel of lands as to which the division was made, No. 416. p. 687. See *Freehold Qualification*, 1. 5.

VERDICT.—See *Proof*, VIII.—*Jury Court*

WITNESS.—See *Proof*, III.

WRIT.—See *Proof*, VI.

WRITER'S HYPOTHEC.—See *Hypothec*.









